STARE DECISIS IN NAME ONLY

Peter Povilonis

TABLE OF CONTENTS

INTRODUCTION

Given the current composition of the Supreme Court—a majority of which has shown a willingness to overturn precedent[1]—the doctrine of stare decisis has reemerged as a major subject of scholarly discussion.[2] The Court has been particularly vocal about the administrative state, with many Justices demonstrating eagerness to pull back on administrative law doctrines.[3] Some of these doctrines have long pedigrees, which means that overruling precedent could undercut reliance interests or increase costs of judicial resources. Rather than formally overruling existing doctrine,[4] the Roberts Court has used a host of strategies to limit the administrative law cannon,

[1] *See, e.g.*, Dobbs v. Jackson Women's Health Org., 142 S.Ct. 2228 (2022) (overruling Roe v. Wade, 410 U.S. 113 (1973)); Ramos v. Louisiana, 140 S.Ct. 1390 (2020) (overruling Apodaca v. Oregon, 406 U.S. 404 (1972)).
[2] *See, e.g.*, Nina Varsava, *Precedent on Precedent*, 169 U. PA. L. REV. ONLINE 118, 119 (2020) ("As other scholars have noted, 'the U.S. Supreme Court has become unusually preoccupied with issues of precedent' since its recent shift in composition.") (quoting Richard M. Re, *Precedent As Permission*, 99 TEX. L. REV. 907 (2021)).
[3] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2131–2148 (2019) (Gorsuch, J., dissenting).
[4] *See* Thomas J. Molony, *Taking Another Look at the Call on the Field: Roe, Chief Justice Roberts, and Stare Decisis*, 43 HARV. J.L. & PUB. POL'Y 733, 738 (2020) (explaining how the Chief Justice "exhibit[s] a reticence to overrule precedent").

from invoking the major questions doctrine[5] to turning exceptions into the rule.[6] The Court's reluctance to overrule cases outright comes from a recognition that overturning precedent could have drastic consequences.[7] And yet, *upholding* precedent can have equally grave consequences when stare decisis is applied incorrectly. This essay will discuss the consequences of a misapplication of stare decisis.

Stare decisis is "the doctrine that courts will adhere to precedent in making their decisions."[8] Although there are many versions of stare decisis, this essay will focus on the Supreme Court's doctrine of stare decisis as applied to *erroneous* precedent. Following precedent—even erroneous precedent—ensures the "stability of law," the principle on which stare decisis is grounded.[9] Maintaining the stability of law can proffer many policy benefits, such as preserving reliance interests, promoting judicial efficiency, or maintaining the Court's "perceived legitimacy."[10] Even if the Court finds a previous decision to be "erroneous," the Court will often weigh the value of stare decisis's benefits to determine if the previous decision should nevertheless be upheld.[11]

In situations where the Court openly asserts that a previous decision is "erroneous" but nevertheless upholds the decision, the merits of this "erroneous" law cannot be the reason why the Court decided to uphold. Instead, the Court upholds an erroneous decision *only* because of its resulting policy benefits.[12] Still, "stare decisis is not an end in itself;"[13] it is only valuable for the benefits it provides. Thus, "if circumstances arose where certainty was not served by stare decisis, or where countervailing advantages

---

[5] *See, e.g.*, West Virginia v. Environmental Protection Agency, 142 S.Ct. 2587 (2022).
[6] *See* Seila Law LLC v. Consumer Financial Protection Bureau, 140 S.Ct. 2183 (2020).
[7] *Dobbs*, 142 S.Ct. at 2311 (Roberts, C.J., concurring) (arguing for "judicial restraint" to avoid the "dramatic and consequential" effects of overruling).
[8] *Stare Decisis*, LEGAL INFORMATION INSTITUTE (Dec. 2021), https://www.law.cornell.edu/wex/stare_decisis.
[9] Theodore M. Benditt, *The Rule of Precedent*, *in* PRECEDENT IN LAW 89, 91 (Goldstein, ed. 1987) ("Stability is indeed an important concern in support of a principle of precedent.").
[10] *See* Nina Varsava, *How to Realize the Value of Stare Decisis: Options for Following Precedent*, 30 YALE J.L. & HUMAN. 62, 68–80 (2018) (explaining the different justifications for stare decisis).
[11] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 378 (2010) (Roberts, C.J., concurring).
[12] *See id.*
[13] *Id.*

could reasonably be preferred, blind adherence to binding precedent could not be justified."[14]

One strategy the Court has implemented to avoid formally overruling past cases is what this essay calls "stare decisis in name only." When invoking stare decisis in name only, the Court claims to uphold a previous decision but nevertheless modifies the rule announced by that previous decision. For example, the Court might supplement the previous rule with a new test, or create exceptions and limitations to the rule. In doing so, the Court changes the law—despite claiming otherwise. In the administrative law context, the Court has deployed stare decisis in name only to limit existing doctrine while simultaneously "proclaiming that no change is underway."[15]

If stare decisis is justified on stability of law grounds, stare decisis in name only threatens that very stability. When the Court alters long-settled law through stare decisis in name only, it "undermine[s] the rule-of-law values that justify stare decisis in the first place."[16] For example, people who were relying on the previous decision must adapt their behavior to a new decision, lower courts may face new litigation concerning the scope of the new law, and the Court's legitimacy is potentially undermined by its presentation of two contradictory holdings. Stare decisis in name only creates more uncertainty than either completely upholding or expressly overruling: Can those previously relying on the old rule still assume it is upheld? Are lower courts supposed to follow the Court's word or new rule? Is the Court perceived as fair and legitimate if it claims one thing but holds another?

In order for the Court to gain the full benefit of stare decisis, it may not subversively change the law. The Court must either uphold a previous decision in its entirety or be clear about what is overruled. The middle ground approach of stare decisis in name only—where the Court attempts to simultaneously uphold and limit—creates the very same uncertainty that stare decisis is meant to avoid. This essay will explore the issue through *Kisor v. Wilkie*,[17] where the Court purported to apply stare decisis yet simultaneously changed the underlying law.

Kisor is a 2019 case in which the Court purported to uphold *Auer* deference[18]—judicial deference to an agency's interpretation of its own

---

[14] Peter Wesley-Smith, *Theories of Adjudication and the Status of* Stare Decisis, *in* PRECEDENT IN LAW 73, 86 (Goldstein, ed. 1987) (emphasis removed).
[15] William O. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 754 (1949).
[16] *Citizens United*, 558 U.S. at 378 (Roberts, C.J., concurring).
[17] 139 S.Ct. 2400 (2019).
[18] Auer v. Robbins, 519 U.S. 452 (1997).

regulations.[19] *Auer* deference, sometimes called *Seminole Rock* deference,[20] has a long judicial history—far longer than *Chevron* deference—and cases applying *Auer*/*Seminole Rock* deference are "legion."[21] However, the Court did not simply uphold *Auer*; it also changed the original rule of deference as applied by the long line of cases in the *Seminole Rock* canon. *Kisor* listed several new requirements that an agency must meet in order to merit judicial deference.[22] For example, one new requirement is that the Court only provides deference to an agency's interpretation if the regulation is "genuinely ambiguous."[23] Previous courts applying *Auer* deference, however, often deferred to the agency's interpretation *without* making any determinations as to whether the regulation was genuinely ambiguous.[24] Instead of expressly overruling these cases applying *Auer* that do not satisfy the new requirements for agency deference, the Court purported to uphold *Auer*'s "longstanding doctrine."[25]

Kisor's application of stare decisis undermines the very reasons for invoking the stare decisis in the first place: *Kisor* destabilizes the law, requires the lower courts to draft all new case law, and creates uncertainty around whether an agency's previous reliance on *Auer* will still fall within *Kisor*'s new limitations. By not authentically upholding—nor expressly overruling—a preexisting rule, the Court creates a false sense of security for those who previously relied on past decisions and might not realize that the state of the law has actually changed.

This essay represents an immanent critique of *Kisor* and will be focused on exemplifying problems with one of the Court's tactics to limit administrative law—stare decisis in name only. This essay will not critique the merits of *Auer* or *Kisor* deference. Rather, it argues that when the Court invokes stare decisis but simultaneously makes changes to the rule being upheld, the Court hollows out many policy benefits of stare decisis—the whole reason to apply the doctrine. The depletion of policy justifications is especially problematic in *Kisor* because stare decisis was the only basis on which the Court could form a coalition to uphold *Auer*. Thus, by creating uncertainty in the law, the *Kisor* Court negates its only justification for upholding the case. Although *Kisor* proclaims "stare decisis," it is but stare decisis in name only.

---

[19] *Kisor*, 139 S.Ct. at 2408.
[20] Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).
[21] *See Kisor*, 139 S.Ct. at 2412 n.3 (citing sixteen Supreme Court cases applying *Auer* deference).
[22] *Id.* at 2415–18.
[23] *Id.* at 2415.
[24] *See supra* Part II.A.
[25] *Id.* at 2408.

Kisor's use of stare decisis in name only is more than a semantic quibble; the decision has already had taxing effects. Post-*Kisor*, lower courts must decide whether previous decisions in the *Auer*/*Seminole Rock* canon are still good law—i.e., whether they fall within the scope of *Kisor*'s new rule). For example, one previous decision in the *Seminole Rock* canon, *Stinson v. United States*,[26] held that a court must provide *Auer* deference to an agency's interpretation of *un*ambiguous provisions—directly contrary to *Kisor*'s new "genuinely ambiguous" requirement.[27] It would seem, therefore, that *Stinson* is no longer good law, because it clearly falls outside the scope of *Kisor*'s genuinely ambiguous requirement. Yet the *Kisor* Court claimed to uphold the "longstanding doctrine" dating back to *Seminole Rock*.[28] Is *Stinson* overruled?

The question of whether *Kisor* overruled *Stinson* has now led to a new circuit split. While circuit splits are great fodder for student notes,[29] they are anathema to the stability of law. Such confusion and creation of circuit splits is not expected when the Court simply upholds precedent. There should be no need to expend judicial resources to determine the scope of a law following a decision based on stare decisis. Rather, a circuit split might be expected from a case which *overturns* precedent, one which creates uncertainty in the law. Therefore, if the Court decides to uphold its past decisions, then it needs to authentically uphold them—with the erroneous rule the previous decisions affirmed. Alternatively, if the Court thinks a doctrine should be overruled or limited, then the Court needs to be clear that it is expressly overruling or limiting the doctrine. If the Court "overrule[s] expressly[,] [s]tare decisis then is not used to breed the uncertainty which it is supposed to dispel."[30]

I. STARE DECISIS

[Redacted]

[26] 508 U.S. 36 (1993).
[27] *Id.* at 44–45; *Kisor*, 139 S.Ct. at 2415.
[28] *Kisor*, 139 S.Ct. at 2408.
[29] *See, e.g.*, Note, *The Future of Judicial Deference to the Commentary of the United States Sentencing Guidelines*, 45 HARV. J.L. & PUB. POL'Y 349, 350 (2022)
[30] Douglas, *supra* note 15, at 749 (emphasis removed).

II. *KISOR V. WILKIE*

* * *

Prior to *Kisor*, the *Auer* doctrine was widely understood to grant broad deference to agencies interpreting their own regulations—broader than *Chevron* deference to agencies interpreting their enabling statutes.[31] However, the *Kisor* Court decided to equate the two standards, drawing on analogies from the limitations on *Chevron* deference.[32] In doing so, the Court acknowledges that it is "somewhat expand[ing] on"[33] or "further[ing]"[34] *Auer* deference. This is clear from two new requirements the Court imposes on *Auer* deference.

A. Genuine Ambiguity Requirement

One area where the *Kisor* Court "somewhat expand[ed] on" the limitations for *Auer* deference is the "genuinely ambiguous" requirement.[35] The Kagan opinion, joined here by Chief Justice Roberts to form a majority, explains that "[f]irst and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous."[36] For those familiar with *Chevron* deference, this may sound familiar—a court should defer to an agency's interpretation of its enabling statute when the language is ambiguous.[37] Pre-*Kisor*, however, deference under *Auer* or *Seminole Rock* did not require "genuine ambiguity."[38] Indeed, *Seminole Rock* held that "the ultimate criterion is the agency's interpretation" which "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation."[39]

---

[31] *See* Udall v. Tallman, 380 U.S. 1, 16 (1965) ("When the construction of an administrative regulation rather than a statute is in issue, deference is even more clearly in order."); U.S. v. Cinemark USA, Inc., 348 F.3d 569, 578 (6th Cir. 2003) ("When an agency is interpreting its own regulations, even greater deference is due to the agency's interpretation.").
[32] *Kisor*, 139 S.Ct. at 2416.
[33] *Id.* at 2414.
[34] *Id.* at 2408.
[35] *Id.* at 2415.
[36] *Id.*
[37] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
[38] Interestingly, a pre-*Kisor* article presciently argues that the *Seminole Rock* standard *should* be changed to align with *Chevron*. *See* Kevin O. Leske, *Between Seminole Rock and A Hard Place: A New Approach to Agency Deference*, 46 CONN. L. REV. 227, 275 (2013).
[39] *Seminole Rock*, 325 U.S. at 414.

Throughout *Auer*'s long history, the Court has remarked on—and made decisions based on—the fact that *Auer* deference does not require the interpreted regulation to be ambiguous. For example, in *U.S. v. Larionoff*,[40] the Court cited *Seminole Rock*'s rule to hold that the Court "need not tarry . . . over the various ambiguous terms and complex interrelations of the regulations."[41] More still, in *Stinson v. United States*,[42] the Court held that the Commentary to the Sentencing Guidelines should be treated as an agency's interpretation of its own legislative rule and is given "controlling weight,"[43] even when the provision was not ambiguous.[44] The *Kisor* Court openly admits that "this Court has applied *Auer* deference without significant analysis of the underlying regulation."[45] Thus, the Court recognized that under traditional *Auer* deference, whether the language of the regulation being interpreted was "genuinely ambiguous" was typically of little concern.[46] Yet in *Kisor*, where the Court purportedly upholds *Auer* deference using stare decisis, the Court establishes a previously unknown "genuinely ambiguous" requirement.

To establish that a regulation is "genuinely ambiguous," an agency must do more than show it is merely "ambiguous."[47] That is, *Kisor* now requires a court to "exhaust all the 'traditional tools' of construction."[48] This is a high standard, one the Court proclaims is "not quite so tame" as before.[49] Exhausting a court's "traditional tools" means that "hard interpretive conundrums, even relating to complex rules, can often be solved."[50] Surprisingly, the citation the *Kisor* Court gives in support of the exhaustion requirement is *Chevron*, with no citations from an *Auer* deference case.[51] The traditional *Seminole Rock* rule—especially as developed in subsequent cases—did not require such an exhaustive construction effort.[52] Notwithstanding, the *Kisor* Court cites to a *Chevron* deference case to

---

[40] 431 U.S. 864 (1977).
[41] U.S. v. Larionoff, 431 U.S. 864, 872 (1977).
[42] 508 U.S. 36 (1993).
[43] *Id.* at 45 (citing *Seminole Rock*, 325 U.S. at 414).
[44] *See id.* at 44 ("[C]ommentary explains the guidelines and provides concrete guidance as to how even unambiguous guidelines are to be applied in practice.").
[45] *Kisor*, 139 S.Ct. at 2414.
[46] *See id.*; *but see* Christensen v. Harris Cnty., 529 U.S. 576, 588 (2000) (holding that a provision must be at least "ambiguous" to merit *Auer* deference).
[47] *See Kisor*, 139 S.Ct. at 2414–15.
[48] *Id.* at 2415.
[49] *Id.* at 2418.
[50] *Kisor*, 139 S.Ct. at 2414.
[51] *See Kisor*, 139 S.Ct. at 2415. The entire paragraph explaining the exhaustion requirement cites only *Chevron* and *Chevron* deference cases. *See id.*
[52] *See, e.g.*, United States v. Larionoff, 431 U.S. 864, 872 (1977).

support its statement that a court "must 'carefully consider' the text, structure, history, and purpose of a regulation, in all the ways it would if it had no agency to fall back on."[53] In direct contrast, the Court in *Seminole Rock* stated, "[o]ur *only* tools, therefore, are the plain words of the regulation and any relevant interpretations of the Administrator."[54] Furthermore, lower courts pre-*Kisor* would not have understood "genuine ambiguity" as a prerequisite to affording *Auer* deference—lower courts post-*Kisor* have already remarked on how *Kisor*'s "genuinely ambiguous" requirement restricted the doctrine.[55]

* * *

B. Reasonableness Requirement

[Redacted]

C. Implications on Stare Decisis

As discussed above, *Kisor* clearly altered the traditional *Auer* doctrine. Viewed in isolation, correcting a doctrine believed to be erroneous is a normal—and perhaps essential—function of the Supreme Court. So, why fret about *Kisor* giving *Auer* deference bite, which may well be good policy? The problem is that the Court claimed to be upholding the *Auer* canon, yet it simultaneously limited the rule of deference found in those cases. *Kisor* was supposedly a case of simple stare decisis, not one addressing the merits of *Auer*. In reality, *Kisor* was neither a simple case of stare decisis, nor an explicit reevaluation of *Auer*. As such, stare decisis in name only has created uncertainty about whether the aspects of the old doctrine now limited by *Kisor*'s new rule—like deference to unambiguous regulations—are still good law.

---

[53] *Id.* (citing Pauley v. BethEnergy Mines, Inc., 501 U.S. 680, 706 (1991) (Scalia, J., dissenting) (*Chevron* deference case)).
[54] *Seminole Rock*, 325 U.S. at 414 (emphasis added).
[55] *See* United States v. Nasir, 17 F.4th 459, 471 (3rd Cir. 2021) ("In *Kisor*, the Court cut back on what had been understood to be uncritical and broad deference to agency interpretations of regulations and explained that *Auer*, or *Seminole Rock*, deference should only be applied when a regulation is genuinely ambiguous."); United States v. Moses, 23 F.4th 347, 348 (4th Cir. 2022) ("[*Kisor*] limited controlling deference to an executive agency's reasonable interpretation of its own regulations to where 'the regulation is *genuinely ambiguous*.'") (emphasis added by *Moses* court).

Moreover, "expand[ing]" or "further[ing]" the doctrine is beyond the "lone question presented,"[56] which was "whether we should abandon the longstanding doctrine."[57] Consequentially, the Court rids this "longstanding doctrine" of many of its defining features. Indeed, under the previous doctrine, deference had been applied to interpretations of unambiguous regulations, but in *Kisor*, the Court abandoned this rule in favor of a *Chevron*-like "genuinely ambiguous" requirement.[58] Further, *Auer*'s plainly erroneous standard was also restricted in favor of *Chevron*'s reasonableness standard.[59]

If the reasonableness and genuinely ambiguous requirements are new limits added to the doctrine by *Kisor*, then what exactly did the Court uphold? Broadly speaking, "deference" to an agency's interpretation of its own regulations remains. Yet with *Kisor*'s new requirements, it is not the same deference of the "longstanding doctrine" the Court purports to uphold. In fact, the Court "corrected" *Auer* deference so much that in the end, the Court's new limitations were strikingly similar to the view of Justice Gorsuch's concurrence, which voted to overrule *Auer*. As Chief Justice Roberts explained, "the distance between the majority and Justice Gorsuch is not as great as it may initially appear."[60] Why? Because "initially," one opinion claims to uphold *Auer* deference while the other states it should be overruled. Yet, if we were to cut out the Court's statements about upholding *Auer*,[61] the Court's opinion would look like an opinion designed to overrule *Auer* deference—exactly what the Gorsuch concurrence wanted.[62] As one scholar noted, "[i]f ambiguity were understood in this sense, the American system of judicial review would operate exactly the same as if we jettisoned *Auer* deference."[63] Ironic, as this means that *Kisor* has deviated from *Auer* so much that it looks the same as an opinion that is voting to overrule *Auer*. Although some form of agency deference may still be intact, the rule has

---

[56] *Kisor*, 139 S.Ct. at 2418.
[57] *Id.* at 2408.
[58] *See supra* Part II.A.
[59] *See supra* Part II.B.
[60] *Kisor*, 139 S.Ct. at 2424 (Roberts, C.J., concurring).
[61] Or as Chief Justice Roberts says, "[a]ccounting for variations in verbal formulation . . ." *Id.*
[62] *See id.* at 2448 (Kavanaugh, J., concurring) ("If a reviewing court employs all the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue. After doing so, the court then will have no need to adopt or defer to an agency's contrary interpretation.").
[63] Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 188 (2019).

been altered. Whatever is being "upheld" is no longer *Auer* deference—*Kisor* deference is now the law.

Certainly, if, in the Court's view, the new limitations are better, then the Court has the capacity to correct the doctrine—and it should probably do so. Further, if the policy justifications behind stare decisis do not outweigh the need to fix an erroneous old rule, then the old rule should be overruled, even if only in part. Alternatively, if the Court wants to uphold its past decisions, then it should uphold them—erroneous rule and all. But the *Kisor* Court tried to have their cake and eat it too. The Court tried to secure the benefit of stare decisis while at the same time fixing its past decision. "Stare decisis is a doctrine of preservation, not transformation"[64]—changing the law prevents stare decisis from preserving the very policy justifications behind the doctrine.

Moreover, the *Kisor* Court cannot *uphold* an element of the test that does not even appear in past decisions. The Court "expand[ing]" or "further[ing]" the doctrine is problematic because the previous cases in the *Auer* canon where deference was given were *not* decided by applying *Kisor*'s test.[65] Thus, the question becomes: which of the old cases would still be given deference under *Kisor*—i.e., how much of the old canon is still good law?

The *Kisor* Court's stare decisis strategy only complicates the determination of whether pre-*Kisor* decisions are good law. Indeed, the Court claims to uphold "those decisions."[66] Which decisions? All of "those decisions"?[67] If all prior decisions are upheld, then what should a lower court do about the new test *Kisor* provided, which is clearly at odds with some past decisions? Or, alternatively, should a court only uphold "those decisions" that adhere to *Kisor*'s new test? But then, what does a court make of *Kisor* purporting to uphold the "longstanding doctrine?" Furthermore, how do we know which cases are upheld and which ones are overruled? Pre-*Kisor*, courts did not always evaluate a regulation for genuine ambiguity or reasonable interpretations, since it was not a required part of the doctrine. Courts certainly did not exhaust all the "traditional tools of construction."

Take a pre-*Kisor* decision like *United States v. Larionoff*,[68] where the Court granted *Auer* deference to the Navy's interpretation of various Department of Defense regulations.[69] Here, the *Larionoff* Court found that

---

[64] *Citizens United*, 558 U.S. 384 (Roberts, C.J., concurring).
[65] *See, e.g.*, United States v. Larionoff, 431 U.S. 864, 872 (1977).
[66] *Kisor*, 139 S.Ct. at 2408.
[67] *See Kisor*, 139 S.Ct. at 2422 ("Kisor asks us to overrule not a single case, but a 'long line of precedents'—each one reaffirming the rest and going back 75 years or more.").
[68] 431 U.S. 864 (1977).
[69] *Id.* at 872.

the regulations "contain a number of ambiguities."[70] Despite "argu[ments] that these regulations, *read together*, establish" an unambiguous meaning,[71] the *Larionoff* Court found it "need not tarry, however, over . . . complex interrelations of the regulations."[72] Hence, the Court granted *Auer* deference to the Navy's interpretation because it was not "plainly erroneous."[73]

Although *Larionoff* applied *Auer* deference, it is not obvious it could have granted *Kisor* deference. The *Larionoff* Court found "ambiguities"—but were these "genuine ambiguities" in the sense *Kisor* requisites? Under *Kisor*, "a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read."[74] Genuine ambiguity requires a court to "carefully consider the text, structure, history, and purpose of a regulation"[75]—which the *Larionoff* Court explicitly declined to do.[76] If the *Larionoff* Court had "read together" the regulations as a whole, as *Kisor* requires, perhaps the regulations would not be ambiguous.

Should lower courts be reexamining similar pre-*Kisor* decisions? The Supreme Court "has applied *Auer* or *Seminole Rock* in dozens of cases, and lower courts have done so thousands of times."[77] Some of these previous decisions may have involved interpretations of genuinely ambiguous provisions, but not every case did (in fact, *Stinson* explicitly upheld an unambiguous provision).[78] If a litigant challenges an agency interpretation that received *Auer* deference in a previous decision, is a court now obligated to undertake a *Kisor* analysis, or can the court dismiss the claim under previously established case law?

Engaging in reexamination of pre-*Kisor* decisions would seem odd considering that *Kisor* claimed to "uphold" those decisions. Normally, reexamining previous decisions would occur after a decision that overruled, not upheld, case law. As explained below, reexamining previous decisions requires expending judicial resources, something stare decisis is supposed to avoid. Uncertainty over which decisions are upheld and which, if any, are overruled exacerbates the problem by making it difficult for lower courts to determine which pre-*Kisor* decisions should still be preserved. Without this certainty, the policy justifications that would have otherwise come from upholding the law are diminished, leaving stare decisis in a mostly hollowed out form.

---

[70] *Id.*
[71] *Id.* (emphasis added).
[72] *Id.*
[73] *Id.*
[74] *Kisor*, 139 S.Ct. at 2415.
[75] *Id.* (citations omitted).
[76] *See Larionoff*, 431 U.S. at 872.
[77] *Kisor*, 139 S.Ct. at 2422.
[78] *Stinson*, 508 U.S. at 44–45

III. THE AFTERMATH OF *KISOR*

[Redacted]

IV. CONCLUSION

Stare decisis, as outlined in this essay, is a post-merits doctrine grounded on the stability of law. This stability is justified only through its policy benefits, but changing the law undermines that stability—which, in turn, undermines the policy justification. By purporting to uphold the law yet simultaneously limiting it, *Kisor* destabilized the law, thereby failing to gain the policy benefits of stability.

It should raise some eyebrows when a case that merely "upholds" precedent somehow engenders a circuit split. But the tragic part is that the circuit split is about the *same* question—the "lone" and "only question"—*Kisor* was supposed to answer: *whether* Kisor *overruled its precedent*. So not only did the Court forfeit most of the benefit of stare decisis, the Court did not even answer the only question it was posed. Indeed, some circuits held that *Kisor did* overrule its precedent. Thus, in the end, *Kisor* presents a paradox: a case that was meant to uphold precedent, has overruled precedent. As the *Kisor* Court writes, "[i]t is the rare overruling that introduces so much instability into so many areas of law, all in one blow."[79] But it is the rare upholding that introduces even more instability, all in the guise of "stare decisis."

Thus, the Court must make a decision: overrule the case, promulgating a better legal rule but sacrificing other policy interests; or uphold the case, obtaining the policy justifications but affirming an erroneous legal rule. The Court cannot have it both ways.

[79] *Kisor*, 139 S.Ct. at 2422.

Peter Povilonis

630-818-0089 • povilonis@uchicago.edu • 5541 S. Everett Ave, Chicago, IL 60637

Writing Sample 2

The following writing sample is a draft of an order ruling on defendant's motion to dismiss, which I wrote during my summer 2021 externship with District Court Judge Christine A. Snyder. Apart from the section entitled "III. LEGAL STANDARD," this work represents my own authentic writing after discussion of ideas with the Judge and clerks.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE CIVIL MINUTES - GENERAL

Case No.	2:21-cv-03214-CAS-MAA	Date	July 19, 2021
Title	WEBER METALS, INC. V. HM DUNN COMPANY, INC.		

Present: The Honorable	CHRISTINA A. SNYDER	
CATHERINE JEANG	Not Present	N/A
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: DEFENDANT'S MOTION TO DISMISS FIRST AMENDED COMPLAINT (Dkt. [12], filed June 15, 2021)

I. INTRODUCTION

This diversity action concerns a contract dispute over payment alleged to be due for aircraft component parts sold pursuant to two purchase orders issued in 2016 and 2018.

On April 14, 2021, plaintiff Weber Metals, Inc. filed this action against defendant HM Dunn Company, Inc. Dkt. 1 ("Compl."). On June 1, 2021, plaintiff filed the operative first amended complaint, asserting claims for: (1) breach of contract, pursuant to Cal. Com. Code § 2709(b); (2) quantum meruit; (3) account stated; (4) open book account. See dkt. 11 ("FAC").

On June 15, 2021, defendant filed the instant motion to dismiss the FAC pursuant to Federal Rule of Civil Procedure 12(b)(6), dkt. 12 ("Mot."), concurrently with a request for judicial notice. Dkt. 13 ("RJN"). On June 28, 2021, plaintiff filed an opposition to the motion, dkt. 15 ("Opp."), along with its own request for judicial notice. Dkt. 17. Defendant filed a reply on July 2, 2021. Dkt. 18 ("Reply").

Having carefully considered the parties' arguments, the Court finds and concludes as follows.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE CIVIL MINUTES - GENERAL

Case No.	2:21-cv-03214-CAS-MAA	Date	July 19, 2021
Title	WEBER METALS, INC. V. HM DUNN COMPANY, INC.		

II. BACKGROUND

Plaintiff alleges the following facts in the FAC.

A. The Parties

Plaintiff is a California forging company with its principal place of business in Paramount, California. Plaintiff forges metal components for use in aerospace applications, including aircraft. FAC ¶¶ 1, 5.

Defendant is a Delaware corporation with its principal place of business in Kansas. Id. ¶ 2. Defendant is a machining company that manufactures finished components for use in aerospace applications, including aircraft. Id. ¶ 5.

B. The Purchase Orders

According to the FAC, defendant hired plaintiff to forge metals to certain specifications to be used in components manufactured for Spirit Aerosystem ("Spirit"). Id. ¶ 6. Defendant issued the first purchase order from Missouri on or about September 21, 2016, for 135 units with a total price of $653,127.30. Id. ¶ 7; dkt. 11-1, Ex. A. Defendant issued a second purchase order from Kansas on or about March 14, 2018, for 92 units with a total price of $445,094.16. Id. ¶ 8; dkt. 11-2, Ex. B. Under the terms of the purchase orders, plaintiff's performance was to be concluded upon completion of the forging of units and notification to defendant that the units are ready for pick up. FAC ¶ 9. According to the FAC, defendant was responsible for picking up the units from both purchase orders upon notification from the plaintiff's place of business within 30 days of notice. Id. Plaintiff completed the forging of all units requested on each of the purchase orders on October 9, 2018, and notified defendant that they were ready for pick up. Id.

Upon notification, defendant received and paid for only some of the units but refused to pick up 110 units from the first purchase order and 27 units from the second purchase order. Id. ¶¶ 10–11. Plaintiff alleges that defendant never claimed any of the custom-made units were defective and did not timely notify plaintiff of cancellation of the purchase orders. Id. ¶ 10. Defendant refused to pick up and pay for those units within 30 days of notification because, according to defendant, Spirit no longer needed those units. Id. Sometime in December 2018, plaintiff demanded payment of the outstanding balance of

$662,803.26, plus interest. Id. ¶¶ 11–12. In response, defendant's representative John Betzen performed a unit count at plaintiff's facility to verify the number of units manufactured. Id. ¶ 12. Betzen confirmed that plaintiff would be paid the amount owed for the units confirmed by Betzen, and, in February 2019, requested that plaintiff create an invoice for payment, which plaintiff did. Id. Thereafter, Betzen left defendant's employ, and the invoice was not paid. Id.

The FAC further alleges that defendant assigned another representative to take over the account and assured plaintiff that defendant was working with Spirit to resolve the dispute between defendant and Spirit. Defendant's negotiations with Spirit took place over the next several months. Id. ¶ 13. Afterwards, defendant informed plaintiff "as early as January 2020" that the dispute with Spirit was resolved, but defendant did not pay the invoice. Id. In February 2020, plaintiff submitted another invoice to defendant. Id. Plaintiff followed up with defendant in November 2020, and had numerous discussions about payment of the amount owed with defendant through December 2020. Id. ¶ 14. During those discussions, defendant never told plaintiff that defendant believed there to be a one-year statute of limitations on plaintiff's claims. Id. Instead, defendant represented that it would be unable to pay plaintiff until defendant received payment from Spirit. Id. According to the FAC, defendant did not dispute that it owed plaintiff payment for the units, but instead disputed only the total number of units for which payment was owed. Id. ¶ 14–15. Plaintiff thereafter submitted a second invoice to defendant on December 2, 2020, reducing the total number of units to 137 and the amount owed to $662,803.26. Id. As of filing this action on April 14, 2021, defendant had not paid plaintiff this amount. Id. ¶ 24.

III. LEGAL STANDARD

A motion pursuant to Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of the claims asserted in a complaint. Under this Rule, a district court properly dismisses a claim if "there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" Conservation Force v. Salazar, 646 F.3d 1240, 1242 (9th Cir. 2011) (quoting Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE CIVIL MINUTES - GENERAL

Case No.	2:21-cv-03214-CAS-MAA	Date	July 19, 2021
Title	WEBER METALS, INC. V. HM DUNN COMPANY, INC.		

of the elements of a cause of action will not do." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level." Id. (internal citations omitted).

In considering a motion pursuant to Rule 12(b)(6), a court must accept as true all material allegations in the complaint, as well as all reasonable inferences to be drawn from them. Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998). The complaint must be read in the light most favorable to the nonmoving party. Sprewell v. Golden State Warriors, 266 F.3d 979, 988 (9th Cir. 2001). However, "a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations." Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009); see Moss v. United States Secret Service, 572 F.3d 962, 969 (9th Cir. 2009) ("[F]or a complaint to survive a motion to dismiss, the non-conclusory 'factual content,' and reasonable inferences from that content, must be plausibly suggestive of a claim entitling the plaintiff to relief."). Ultimately, "[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Iqbal, 556 U.S. at 679.

Unless a court converts a Rule 12(b)(6) motion into a motion for summary judgment, a court cannot consider material outside of the complaint (e.g., facts presented in briefs, affidavits, or discovery materials). In re American Cont'l Corp./Lincoln Sav. & Loan Sec. Litig., 102 F.3d 1524, 1537 (9th Cir. 1996), rev'd on other grounds sub nom Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach, 523 U.S. 26 (1998). A court may, however, consider exhibits submitted with or alleged in the complaint and matters that may be judicially noticed pursuant to Federal Rule of Evidence 201. In re Silicon Graphics Inc. Sec. Litig., 183 F.3d 970, 986 (9th Cir. 1999); Lee v. City of Los Angeles, 250 F.3d 668, 689 (9th Cir. 2001).

As a general rule, leave to amend a complaint which has been dismissed should be freely granted. Fed. R. Civ. P. 15(a). However, leave to amend may be denied when "the court determines that the allegation of other facts consistent with the challenged pleading

could not possibly cure the deficiency." Schreiber Distrib. Co. v. Serv-Well Furniture Co., 806 F.2d 1393, 1401 (9th Cir. 1986); see Lopez v. Smith, 203 F.3d 1122, 1127 (9th Cir. 2000).

IV. DISCUSSION

A. Judicial Notice

"Generally, the scope of review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint." Marder v. Lopez, 450 F.3d 445, 448 (9th Cir. 2006). However, Federal Rule of Evidence 201 empowers a court to take judicial notice of facts that are either "(1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b); Mullis v. U. S. Bankr. Court for Dist. of Nevada, 828 F.2d 1385, 1388 n.9 (9th Cir. 1987). In other words, "[i]f the documents are not physically attached to the complaint, they may be considered if the documents' 'authenticity . . . is not contested' and 'the plaintiff's complaint necessarily relies' on them." Lee, 250 F.3d at 688.

Defendant requests that the Court take judicial notice of a document entitled "HM Dunn Aerosystems Purchasing Terms and Conditions" (Exhibit 1). According to defendant, Exhibit 1 can be found on defendants website, and it allegedly sets forth the terms and conditions of its purchase orders. Defendant states that the purchase orders attached to the FAC refer to Exhibit 1 in fine print as follows: "Quality Clauses and Terms & Conditions apply. Documents available on Supplier Portal at http://www.hmdunn.com." Mot. at 8; see RJN. Defendant contends that even though plaintiff does not refer to these terms and conditions in the FAC, the purchase orders incorporate these terms and conditions through the reference to defendant's website on the purchase orders. Id. at 3. Accordingly, the purchase orders would be subject to the terms of Exhibit 1, which contain a limitations provision restricting action on any claim against defendant to within one year after the cause of action has accrued. Mot. at 11–12; RJN at 14. If the breach of contract occurred in November 2018, plaintiff filed this action approximately two and a half years after the claims for relief accrued. Mot. at 6. Defendant therefore argues that plaintiff's claims based on the purchase orders are time-barred by the one-year limitations period set

forth in the terms and conditions contained in Exhibit 1. Id. at 12. As such, defendant contends that the FAC should be dismissed for failure to state a claim upon which relief can be granted. Id.

In opposition, plaintiff challenges the authenticity of Exhibit 1, arguing that there is nothing in the document that confirms that Exhibit 1 sets forth the same terms and conditions that were in existence and referred to in the first purchase order issued in 2016 and the second purchase order issued in 2018. Opp. at 5. In addition, plaintiff argues that it never signed or agreed to the terms and conditions in Exhibit 1, which contains a signature line that is left blank. Id.; RJN at 16. According to plaintiff, the FAC does not reference or otherwise incorporate Exhibit 1. Opp. at 4; see generally FAC.

In response to plaintiff's challenge to Exhibit 1's authenticity, defendant points to the date listed in a subparagraph on the second page of Exhibit 1, which states, "(August 2013 version 1)." Reply at 3; RJN at 5.

At this preliminary stage, the Court cannot conclude as a matter of law that the terms and conditions set forth in Exhibit 1 are part of the parties' agreements as alleged in the complaint. For one, defendant has not established that Exhibit 1 sets forth the terms and conditions referred to in the purchase orders. While the same URL appears in both purchase orders, the URL alone is insufficient to demonstrate that the website (to which the URL refers) contained the same terms and conditions in 2016 and 2018. There is nothing contained in Exhibit 1 that confirms that the terms and conditions defendant now puts forward are the same terms and conditions referenced by the purchase orders. Defendant's contention that Exhibit 1 is the 2013 version of the terms and conditions does not establish it is the same version that was available on defendant's website in 2016 and 2018. Furthermore, regardless of whether Exhibit 1 sets forth the terms and conditions that were in existence in 2016 and 2018, the parties dispute whether the purchase orders are subject to the terms and conditions stated by Exhibit 1. For instance, plaintiff contends that it did not agree to the terms and conditions as stated on defendant's website.

Therefore, because the terms and conditions in existence during 2016 and 2018 are the subject of a factual dispute, the terms and conditions set forth in Exhibit 1 are not properly the subject of judicial notice. Moreover, even if there were no factual dispute as

to what terms and conditions were in existence in 2016 and 2018, the Court could not conclude at this stage of the proceedings that the limitation provision would bind plaintiff. This is so because plaintiff may have a variety of contractual defenses as to whether it can be bound by the terms and conditions as stated on defendant's website.

Therefore, because there are factual disputes regarding the authenticity of Exhibit 1, as well and the terms and conditions the parties agreed to, the Court cannot conclude that Exhibit 1 is incorporated by reference into the FAC. As such, the Court is unable to determine whether the limitation provision in Exhibit 1 would bind plaintiff, including with respect to any contractual defenses plaintiff may raise. Accordingly, the Court declines to take judicial notice of Exhibit 1.[1] See JL v. Weber, No. 17-cv-0006-CAB (WVG), 2017 WL 2959286, at *3 (S.D. Cal. July 11, 2017) (declining to take judicial notice because plaintiff challenged the authenticity of the document).

Accordingly, defendant's request for judicial notice is **DENIED**.

B. Statute of Limitations

Defendant moves to dismiss only on the ground that plaintiff's claims are barred by the statute of limitations. See Mot. Plaintiff opposes, arguing that each of its claims are timely. See Opp.

1. Novation

As an initial matter, based on plaintiff's allegations in the FAC, it appears to the Court that the invoice plaintiff submitted to defendant on December 2, 2020 seeking a reduced amount of $662,803.26 may possibly constitute a novation of the parties' contracts. To the extent that such a novation occurred on December 2, 2020, each of plaintiff's claims have been timely asserted, even assuming *arguendo* that a one-year

[1] Plaintiff has also submitted a request for judicial notice of three COVID-19 emergency orders that toll the statute of limitations. As the motion to dismiss is denied on other grounds, this request is **DENIED as moot**.

limitations period applies. The Court requests that the parties address this issue at oral argument.

2. State Law

Plaintiff argues, apart from the limitations period set forth in Exhibit 1, that each of the purchase orders is subject to the statutory limitations periods prescribed by the relevant state law. Plaintiff argues that California law applies; defendant argues that Kansas and Missouri law applies. Id.; Mot. at 10.

Although the parties dispute which states' laws apply, all of the potentially applicable state statutes of limitations provide for at least a four-year limitations period for claims for breach of a written contract. In California, an action on any written contract is subject to a four-year statute of limitations period, pursuant to Cal. Civ. Proc. § 337(1). Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co., 116 Cal.App.4th 1375, 421 (2004). In Kansas, the statute of limitations period for action upon any agreement in writing is five years, pursuant to Kan. Stat. Ann. § 60-511(1). Law v. Law Co. Bldg. Assocs., 295 Kan. 551, 566, 1075 (2012). Likewise, in Missouri, all general actions upon contracts are subject to a five-year statute of limitations period, pursuant to Mo. Ann. Stat. § 516.120(1). DiGregorio Food Prods. v. Racanelli, 609 S.W.3d 478, 480 (Mo. 2020).

Here, plaintiff has pled the existence of an agreement between the parties formed by the purchase orders. According to the FAC, plaintiff completed its performance in October 2018, upon creating the units and notifying defendant the units were ready for pick up. FAC ¶ 9. Plaintiff alleges that defendant was obligated to pay plaintiff for these units within 30 days of notice, but defendant did not pick up or pay for all the units within 30 days. Id. ¶ 10–11. As such, plaintiff alleges that the breach of contract occurred at the earliest in November 2018, which is approximately two and one-half years from the date of filing this action. Therefore, the Court finds that under each state's potentially applicable statute of limitations, plaintiff has alleged facts sufficient to support its claim for breach of contract.

Accordingly, because plaintiff's claims are timely under every potentially applicable state statute of limitations, the motion to dismiss is **DENIED**.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

TENTATIVE CIVIL MINUTES - GENERAL

Case No.	2:21-cv-03214-CAS-MAA	Date	July 19, 2021
Title	WEBER METALS, INC. V. HM DUNN COMPANY, INC.		

V. CONCLUSION

In accordance with the foregoing, the Court orders as follows:

1. The Court **DENIES** defendant's request for judicial notice.
2. The Court **DENIES** defendant's motion to dismiss.

IT IS SO ORDERED.

: _____ _____

Initials of Preparer _____

Applicant Details

First Name	**Meg**
Last Name	**Pritchard**
Citizenship Status	**U. S. Citizen**
Email Address	**mlp8s@virginia.edu**
Address	**Address** **Street** **4149 Ballards Mill Rd** **City** **Free Union** **State/Territory** **Virginia** **Zip** **22940** **Country** **United States**
Contact Phone Number	**4344664204**

Applicant Education

BA/BS From	**Yale University**
Date of BA/BS	**May 2018**
JD/LLB From	**University of Virginia School of Law** **http://www.law.virginia.edu**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Virginia Environmental Law Journal** **Virginia Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**William Minor Lile Moot Court Competition** **National Energy & Sustainability Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Barzun, Charles
cbarzun@law.virginia.edu
(434) 924-6454

Livermore, Michael
mlivermore@law.virginia.edu
(434) 982-6224

Schwartzman, Micah
schwartzman@law.virginia.edu
434-924-7848

This applicant has certified that all data entered in this profile and any application documents are true and correct.

MEG L. PRITCHARD

525 Seymour Rd Apt 7, Charlottesville, VA 22903 | 434.466.4204 | mlp8s@virginia.edu

June 12, 2023

The Honorable Jamar K. Walker
U.S. District Court, E.D. Va.
600 Granby St
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year law student at the University of Virginia School of Law, and I am writing to apply for a clerkship in your chambers. I expect to receive my J.D. in May 2024 and will be available to begin work any time after that date.

I was born and raised in Charlottesville, Virginia, and I am eager to remain in the state. I plan to practice in Virginia or the Washington, D.C. area following my graduation.

Enclosed please find a copy of my resume, law school transcript, and writing sample. Additionally, I have included letters of recommendation from Professor Charles Barzun (434-924-6454), Professor Michael Livermore (434-982-6224), and Professor Micah Schwartzman (434-924-7848). The Honorable Vince G. Chhabria (415-522-2796) of the Northern District of California may serve as another reference.

If you would like any additional information or otherwise need to contact me, please feel free to reach me at the above telephone number and address. Thank you for your consideration.

Sincerely,

Meg Pritchard

MEG L. PRITCHARD

525 Seymour Rd Apt 7, Charlottesville, VA 22903 | 434.466.4204 | mlp8s@virginia.edu

EDUCATION

University of Virginia School of Law, Charlottesville, VA
J.D., Expected May 2024

- GPA: 3.74
- Dean's Scholarship Recipient
- Bracewell LLP Appellate Advocacy Award for Best Oral Argument
- *Virginia Law Review*, Editorial Board
- *Virginia Environmental Law Journal*, Managing Editor
- William Minor Lile Moot Court Competition, Semifinalist
- Extramural Moot Court, Coach
- Program in Law and Public Service, Fellow
- Asian Pacific American Law Students Association, Member

Yale University, New Haven, CT
B.A., English, May 2018

- Writing Concentration Program (intensive thesis with 10% acceptance rate)
- Dean's Committee for Advising and Enrollment, Student Representative
- Club Running Team, President

EXPERIENCE

Covington & Burling LLP, Washington, DC
Summer Associate, May – July 2023

- Wrote memoranda on deposition procedures and proposed EPA rulemaking
- Drafted and edited blog post distilling major points from FTC comments

University of Virginia School of Law, Charlottesville, VA
Research Assistant to Professor Michael Livermore, February – May 2023

- Updated and copy-edited two chapters of environmental law textbook
- Researched and drafted notes reflecting administration changes and new case law

U.S. Environmental Protection Agency, New York, NY
Legal Intern, May – July 2022

- Drafted and edited Clean Water Act § 1319(g) Consent Agreements/Final Orders
- Wrote memorandum on impacts of new legislation on civil rights complaints

Overland Summers, Williamstown, MA
Assistant Director of Logistics and Risk Management, June 2019 – August 2021

- Planned 71 domestic and international outdoor leadership trips for students
- Managed Covid-19 task force for risk management and contingency planning
- Led 39 high school students on backpacking expeditions in Alaska and California

Alaska Fellows Program, Anchorage, AK
Research & Reporting Fellow, September 2018 – May 2019

- Wrote briefs advocating for increased federal funding for outdoor recreation
- Drafted and edited a 68-page report on the state of Alaska's trails
- Organized a 5-week blue tech innovation sprint for community members

INTERESTS

Long-Distance Running, Contemporary Fiction, NYT Spelling Bee

UNIVERSITY OF VIRGINIA
SCHOOL OF LAW

Name: Megan Pritchard

Date: June 07, 2023
Record ID: mlp8s

This is a report of law and selected non-law course work (including credits earned). This is not an official transcript.

Due to the global COVID-19 pandemic, the Law faculty imposed mandatory Credit/No Credit grading for all graded classes completed after March 18 in the spring 2020 term.

		FALL 2021			
LAW	6000	Civil Procedure	4	A-	Solum,Lawrence
LAW	6002	Contracts	4	B+	Hellman,Deborah
LAW	6003	Criminal Law	3	A-	Jeffries Jr.,John C
LAW	6004	Legal Research and Writing I	1	S	Fore Jr.,Joe
LAW	6007	Torts	4	A-	Cope,Kevin
		SPRING 2022			
LAW	6001	Constitutional Law	4	B+	Mahoney,Julia D
LAW	6112	Environmental Law	3	A	Livermore,Michael A.
LAW	7088	Law and Public Service	3	A	Kim,Annie
LAW	6005	Lgl Research & Writing II (YR)	2	S	Fore Jr.,Joe
LAW	6006	Property	4	A-	Hynes,Richard M
		FALL 2022			
LAW	7017	Con Law II: Religious Liberty	3	A	Schwartzman,Micah Jacob
LAW	6104	Evidence	4	A-	Barzun,Charles Lowell
LAW	9076	Natural Resources Law & Policy	3	A-	Szeptycki,Leon
LAW	7071	Professional Responsibility	3	A	Mitchell,Paul Gregory
		SPRING 2023			
LAW	7637	Trial Advocacy College (SC)	2	CR	Saltzburg,Stephen A
		SPRING 2023			
LAW	6102	Administrative Law	4	A-	Bamzai,Aditya
LAW	7014	Conflict of Laws	3	A	Bamzai,Aditya
LAW	7730	Lawyers,Clerks,Jud Dcisionmkng	1	A	Cui,Gregory
LAW	7062	Legislation	4	A-	Nelson,Caleb E
LAW	7650	Litig and Pub Policy (SC)	1	A+	Chhabria,Vince

June 08, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend highly Meg Pritchard for a clerkship in your chambers. Meg is a bright, engaged, and curious young woman, who I think would make a terrific clerk in your chambers.

I first met Meg when she enrolled in my Evidence class in her second year. I teach Evidence in a fairly traditional way, using a combination of Socratic method, lecture, and voluntary class discussion. Meg's class had only 46 students in it, which was much smaller than my typical Evidence class because it was in the fall and so had no first-year students. I thus got to know the students better than I typically would. And I got to know Meg better than most of her classmates because she often raised her hand to ask questions and frequently came to office hours throughout the semester. What I really appreciated about Meg was that she was never satisfied with superficial explanations or justifications for the rules of evidence. She always wanted to dig deeper and to make sure she fully understood what a given rule was aimed at and how it functioned in practice. I was thus not surprised that Meg did very well on the exam, earning an A- for the course.

Meg's performance in my class has been typical of her time at the law school. After two years, her GPA stands at 3.74, which places her in the top 15% of her class. Even more impressive, she has put together this record while throwing herself into the intellectual and extracurricular life of the law school. She is the Managing Editor of the Virginia Environmental Law Journal and also serves on the editorial board of the Virginia Law Review; she is a fellow in the Program in Law and Public Service and also serves as Pro Bono / Outreach Chair of the Virginia Environmental Law Forum; and she was a semifinalist in the Lile Moot Court Competition.

This summer Meg will be working at Covington & Burling in Washington, D.C. I believe that after clerking Meg hopes either to return to private practice or to go directly into public service, probably in the area of environmental law, which is her passion. No matter where she ends up, however, I have every reason to think that Meg will find tremendous success there because she is smart, focused, curious, and a pleasure to talk with and be around.

For those same reasons, I also think she will make a great legal clerk. Still, if you have any questions about Meg, or would like to discuss her candidacy any further, please do not hesitate to email me (cbarzun@law.virginia.edu) or call me at any time (434-924-6454), and I will call you back at your convenience.

Sincerely,

Charles L. Barzun

June 04, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Meg Pritchard for a clerkship position in your chambers. Meg was a student in my environmental law course in the spring of 2022. Meg was an excellent student—smart, engaged, and enthusiastic. It was always a genuine pleasure to interact with her. She is also a highly active and valued member of the Law School community, participating in several student organizations and activities, with a strong commitment to public service. I'm highly confident that she would be an excellent clerk.

My environmental law class tends to focus on the interaction of economic, moral, scientific, and political factors with environmental policymaking. I assess students in a variety of ways for this course. Instead of requiring students to submit a final exam (as is common in environmental law survey courses), I ask them to complete a substantive paper that applies the concepts in the course to an environmental regulatory or policy question. The goal with this final project is to provide students with an opportunity to engage with legal materials beyond judicial opinions and to gain familiarity with some of the regulatory and administrative materials not commonly found in law school casebooks. In addition to the final project, I assess students on two short midterms, an online discussion forum, and class participation.

Meg excelled in every aspect of the course. In class, her intellectual curiosity and enthusiasm were readily apparent, and she quickly learned to navigate the complex statutory and policy questions presented by environmental law. She demonstrated a strong grasp of the blackletter law in her midterms, and provided numerous insightful comments in the online discussion forum.

Meg's final paper was excellent. As an undergraduate at Yale, she was accepted into the writing concentration program, and she has an obvious talent for expressing complex ideas in clear, understandable prose. Her paper focused on market-based wetlands mitigation banking, which is a technical and specialized area of law under the Clean Water Act. Section 404 of the Act regulates the discharge of dredged material into the nation's waters and wetlands. That section has long been interpreted to allow for "mitigation," including compensatory mitigation. The basic idea of compensatory mitigation is that a permit for a discharge may be granted, even if that discharge has unavoidable harmful effects, if the permittee engages in sufficient restoration to offset that harm. By generating a benefit elsewhere, a compensatory mitigation plan (in principle) results in no overall net negative impact.

The Environmental Protection Agency (EPA) and Army Corps, which together administer section 404, allow for compensatory mitigation banking. This practice enables actors to engage in restoration activities that are "banked" for the purpose of offsetting some future permitted discharge. Mitigation banking creates a marketplace for environmental protection that provides an economic incentive for market participants to identify and invest in wetlands restoration. EPA and the Corps have issued joint regulations on wetlands mitigation banking, and there is a reasonably robust national market.

Meg's paper analyzes the existing wetlands banking systems, identifies problems and limitations, and proposes useful reforms. There are many complexities in how this program is implemented that affect the incentives of market participants. Wetlands banks face substantial upfront costs and price uncertainty that is compounded by the considerable discretion of regulators when deciding whether to approve individual compensatory mitigation plans. An additional difficulty of this marketplace is the basic non-fungibility of the underlying good—not all wetlands are created equally, nor do they have the same overall ecological or social value. Meg discusses several ways in which the current system may lead market participants to focus investments on certain types of sub-optimal restoration activities. After identifying these issues, Meg offers several sensible suggestions for reforms to the program, including additional research and greater uniformity in regulatory standards.

Outside the classroom, Meg actively participated in the law school community, serving on two law journals, as a fellow in the public service program, and as a leader in the Environmental Law Forum, which is a student group that hosts intellectual events centered around environmental themes. She has a particular passion for environmental issues, and I enjoyed our many conversations about environmental policy and potential career paths in the area.

I believe that Meg would be an excellent addition to your chambers. She is intelligent and enthusiastic, and is an outstanding writer. She also is a hard worker and is willing and able to dedicate herself to mastering complex and difficult areas of law. Finally, she is a delightful person, and I'm confident she would fit in well with the rest of your team in chambers.

Please let me know if I can provide you with any additional information.

Warm regards,

Michael A. Livermore

UVA Law School

Michael Livermore - mlivermore@law.virginia.edu - (434) 982-6224

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing on behalf of Meg Pritchard, who has applied for a clerkship in your chambers. I have chaired the faculty clerkships committee at Virginia for nearly fifteen years. In that capacity, I have worked with many of our strongest clerkship applicants, and I have every confidence that Meg has distinguished herself as one of them. On top of her sheer intellectual abilities, which are formidable, she is a superb writer. Meg is also down-to-earth, mature, and unflappable. She handled more than her share of emergencies running logistics during the COVID-19 pandemic. I don't think the stresses of clerking are going to test her tolerance levels, even in the most hard-working chambers. Meg is going to make a terrific clerk, and I recommend her to you with the greatest enthusiasm.

Meg was outstanding in my course on Constitutional Law II: Religious Liberty. In the fall of 2022, I had 72 students, including most of the top-25 in the second-year class. I allow a paper option instead of a traditional exam, and 20 students chose to exercise it. Among them, Meg's paper was both brilliant and memorable. Her paper, entitled The Future of History: American Blasphemy Laws in the Modern Establishment Clause, focused on the importance of recent changes in Establishment Clause doctrine after the Supreme Court's decision last year in Kennedy v. Bremerton School District. Abandoning the Lemon test, the Court has adopted an approach to interpreting the Establishment Clause that emphasizes "history and tradition." Meg's question is whether that approach could authorize blasphemy laws. Although such laws have been disfavored for many decades now, they find significant support during the Founding era and continuing through the early 20th century. With expert grounding in historical sources, and with impressive command of the secondary literature, Meg argues persuasively that the Court's new approach raises difficult and thorny questions about the status of blasphemy laws, which some constitutional scholars, especially recent proponents of so-called "common good constitutionalism," have urged courts to reconsider.

I could go on about the virtues of Meg's paper and, more generally, about her ability to synthesize complex legal and historical materials. The bottom line is that her writing abilities are a cut above. She is already far more advanced than most clerks. I gave her a straight A for her paper and for the course. But her grade is really the least of it. Meg is a gifted and practiced writer, which is going to serve her well in any chambers and in whatever capacity she decides to practice law.

Meg's grade in my course reflects a consistent record of academic excellence. Her cumulative GPA of 3.74 puts her well inside the top 15% of her class. Her grades have improved each semester, and her GPA in courses that require papers is 3.96. She has also taken a rigorous course load, including classes with many of our most demanding faculty. Given her intellectual abilities, worth ethic, and trajectory, I would expect her to graduate inside the top 10% of her class. As both an undergraduate at Yale, where her GPA was 3.82, and as a law student, Meg has been a terrific student.

Outside the classroom, Meg has a deep commitment to environmental law and justice. After graduating from college, she worked with environmental groups in Anchorage, Alaska, organizing community members and collaborating with nonprofit leaders and government agencies. Meg then moved to New England, where she ran operations for an outdoor travel group. When the pandemic hit in the spring of 2020, she had to manage what sounds to me like a series of logistical nightmares. But she worked through them successfully, and I have no doubt about her ability to be a problem-solver under pressure.

At UVA, Meg is a leader in our intellectual community, serving on both the Virginia Law Review and the Virginia Environmental Law Journal, where she is Managing Editor. Her commitment to environmental justice extends into her work as Pro Bono Chair of the Virginia Environmental Law Forum and as a fellow in our Program in Law and Public Service. And on top of all that, she has competed in the Lile Moot Court, reaching the semi-final rounds. That she has the time and energy for all this work, and at such a high level, is impressive.

If you decide to meet her, I think you will find Meg to be delightful in person. She knows what it means to put in the hard work and for others to rely on her. I have no doubt that she will be a team player and will get along well with her co-clerks. They will value her friendship and be reassured by her commitment and sound judgment.

I have high expectations for Meg Pritchard. She has a brilliant career ahead of her, and I know that she will be a credit to anyone who hires her.

If you have any questions, please feel free to reach me at 434-924-7848.

Sincerely,

/s/

Micah J. Schwartzman
Hardy Cross Dillard Professor of Law
Roy L. and Rosamond Woodruff Morgan

Micah Schwartzman - schwartzman@law.virginia.edu - 434-924-7848

Professor of Law
University of Virginia School of Law
580 Massie Road
Charlottesville, Virginia 22903-1738
Phone: 434-924-7848
Fax: 434-982-2845
Email: schwartzman@law.virginia.edu

MEG L. PRITCHARD

525 Seymour Rd Apt 7, Charlottesville, VA 22903 | 434.466.4204 | mlp8s@virginia.edu

Writing Sample

This writing sample is excerpted from a bench memorandum written for the course "Lawyers, Clerks, and Judicial Decisionmaking" in May 2023.

In this excerpt, I recommend that the U.S. Supreme Court reverse the judgment of the en banc Fifth Circuit in *United States v. Dubin*, 27 F.4th 1021 (5th Cir. 2022).

For length and clarity, I have omitted the memorandum's header, summary, question presented, factual background, procedural history, and standard of review. The full memorandum is available on request. This writing sample is my own work product and has not been edited by any other person.

DISCUSSION

This Court should reverse the decision of the court below and find that a person does not commit aggravated identity theft under 18 U.S.C. § 1028A(a)(1) any time he mentions or otherwise recites someone else's name while committing a predicate offense. This Court must find whether David Dubin (1) used Patient L's identity; (2) used that identity "in relation to" his predicate healthcare fraud offense; and (3) used that identity "without lawful authority."

Below, I will discuss each of these issues in turn. I will recommend that this Court reverse the decision of the court below, finding that Dubin *did* use Patient L's identity, that Dubin *did not* use that identity "in relation to" his predicate offense, and that he *did* use that identity "without lawful authority."

I. Dubin Did "Use" Another Person's Identity.

As a preliminary matter, it seems likely that David Dubin did "use" Patient L's identification under § 1028A(a)(1). As the Fifth Circuit panel noted, "deciding whether a person 'use[d]' something seems to be a relatively straightforward yes or no." *United States v. Dubin*, 982 F.3d 318, 325 (5th Cir. 2020). While some courts have conflated analyses of "use" alone and "use" when paired with other statutory provisions, this Court should take care not to do the same and risk muddying the waters for lower courts. *See, e.g.*, *United States v. Medlock*, 792 F.3d 700, 705–06 (6th Cir. 2015) (discussing "use" as colored by the "in relation to" provision). The text of § 1028A supports this reading, and this Court's own precedent suggests that "use" should be read broadly here. Further, such a broad application of "use" would not be unworkable or undesirable given the other limiting provisions of this and similar statutes.

A. The text of Section 1028A is unambiguous.

The plain meaning of the text indicates that Dubin did "use" Patient L's name and Medicaid ID number when he submitted a fraudulent reimbursement claim. To "use" commonly means "to employ for the accomplishment of a purpose" or "to avail oneself of." *Black's Law Dictionary* (11th ed. 2019). Dubin could not have submitted a Medicaid reimbursement claim without a patient's identifying information attached; Dubin thus "used" Patient L's information by employing it for the purpose of submitting a Medicaid claim.

While neither party makes this argument, the Sixth Circuit has attempted to narrow "use" through the *noscitur a sociis* and *ejusdem generis* canons, claiming that the preceding terms "transfer" and "possess" are "specific kinds of use" that limit its meaning. *United States v. Miller*, 734 F.3d 530, 541 (6th Cir. 2013); *see also Medlock*, 792 F.3d at 706 ("This rationale remains persuasive."). *But cf. United States v. Michael*, 882 F.3d 624, 626 (6th Cir. 2018) (citing several dictionary definitions in support of a "fairly straightforward" construction). And the First Circuit has relied instead on the presumption against superfluity to find that "'use' cannot be given its broadest possible meaning, which would subsume the separate statutory terms 'transfer[]' and 'possess[].'" *United States v. Berroa*, 856 F.3d 141, 156 (1st Cir. 2017).

These arguments do not overcome the word's plain meaning. The Sixth Circuit's reading of "transfer" and "possess" as narrowing subsets of "use" runs afoul of the presumption against superfluity. And the First Circuit's assertion that "use" not be overbroad is not inconsistent with its dictionary definition, which conceivably covers some actions where "possess" or "transfer" would not apply—such as the utilization of an account's saved credit card information to make an unauthorized purchase, where the card number itself is not visible to the user.

With this understanding of the word, Dubin did indeed "use" the Medicaid information in question under § 1028A. To the extent that "use" may take on additional meaning when paired with the other provisions of the statute, I explore that issue in the discussion below.

B. This Court's analogous precedent supports a broad reading of "use."

Further, this Court's interpretation of "use" in the firearm sentencing enhancement statute 18 U.S.C. § 924(c)(1) provides support for a broad understanding of "use" in the federal aggravated identity theft statute. Section 924 requires specific penalties if the party "during and in relation to any crime of violence or drug trafficking crime uses or carries a firearm," a formulation that is nearly parallel to that of § 1028A. *See United States v. Smith*, 756 F.3d 1179, 1187 (10th Cir. 2014) (calling § 1028A a "close legislative cousin" of § 924). This Court held that the attempted trade of a firearm for drugs was a "use" of the firearm as covered by § 924(c)(1), despite the defendant's arguments that "use" should only extend to typical applications of the firearm as a weapon. *Smith v. United States*, 508 U.S. 223, 228–30 (1993). In so doing, the Court endorsed a broad understanding of "use" in criminal statutes that encompassed atypical applications. *Id.* at 230.

Of course, § 924 and § 1028A are distinct statutes with distinct purposes. And this Court's reasoning in *Smith* relied in part on language in § 924(d) which more explicitly contemplated atypical uses of firearms—language which § 1028A does not parallel. *See id.* at 233–34 ("To the extent there is uncertainty about the scope of the phrase 'uses . . . a firearm' in § 924(c)(1), we believe the remainder of § 924 appropriately sets it to rest.").

Yet this Court's precedent is instructive for two reasons. First, the parallel structures of the analogous provisions suggest that Congress intended "use" to operate similarly in both. Second, the Court's reasoning may be even stronger when applied to aggravated identity theft.

Writing for the majority in *Smith*, Justice O'Connor had to overcome a strong argument that "the average person on the street would not think immediately of a guns-for-drugs trade" as "use" of a firearm, in part because a firearm has an obvious intended purpose as a weapon. *Id*. at 229–30. By contrast, the "use" of personal identification information has no such obvious or intuitive meaning, making the broad construction of "use" a more natural reading in the context of identity theft. The application of this Court's precedent thus suggests that Dubin's inclusion of patient Medicaid information in his inflated reimbursement claim would qualify as "use" under the aggravated identity theft statute.

C. The consequences of a broad reading would not hinder federalism or prove unworkable.

Petitioner's brief notes the existence of § 1028(a)(7), which creates a federal crime when someone "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law." 18 U.S.C. § 1028(a)(7); Pet'r Br. 35. Petitioner argues that a broad reading of "use" in § 1028A would demand a similar reading in § 1028(a)(7), which in turn would transform a huge number of state and local crimes into federal offenses in violation of the federalism canon.

This argument is not entirely persuasive, for two reasons. First, it ignores the other limiting statutory language that would check the expansion of federal power: "without lawful authority," as discussed below, likely implicates a lack of consent from the owner of the identification, while "knowingly" as interpreted by this Court in *Flores-Figueroa v. United States* "requires the Government to show that the defendant knew that the means of identification at issue belonged to another person." 556 U.S. 646, 657 (2009). Even "a means of identification"

may have implied limitations. In short, a broad reading of "use" does not necessarily mean the unchecked encroachment of the federal government into state and local affairs.

Second, such an argument ignores the plain meaning of "use" discussed above. Where Congress's legislative intent is clear, as it is here, the judiciary must give that intent full effect. Resisting the criminalization of behavior in this case would not reflect congressional aims.

II. Dubin Did Not Use Another Person's Identity "In Relation To" Fraud.

Should this Court construe "use" broadly, Dubin's actions certainly fall within its parameters. But whether Dubin used Patient L's information "in relation to" his predicate healthcare fraud requires more difficult line-drawing. Weighing textual, practical, purpose-based, and precedential arguments, this Court should adopt a narrow reading of "in relation to" as requiring a meaningful connection between a stolen identity and the predicate crime. Accordingly, this Court should find that Dubin did not use Patient L's identity "in relation to" his fraud.

A. Four factors point toward a narrower construction of "in relation to."

The best support for a broad interpretation of the phrase is a literal, acontextual reading of "in relation to." Read plainly, "in relation to" could imply an unqualified relationship: it suggests that *any* relationship between the personal identifying information at issue and a predicate offense suffices to trigger the § 1028A sentence enhancement, even if that relationship is purely incidental to the criminal activity. *See* Pet'r Br. 22 (implying that Respondent endorses such an interpretation).

But this reasoning fails to overcome strong indications that courts should construe "in relation to" more narrowly. And even Respondent agrees that "in relation to" limits the scope of § 1028A by "preclud[ing] prosecution where the means of identification 'played no part in the

crime.'" U.S. Br. 14, 30 (quoting *Muscarello v. United States*, 524 U.S. 125, 137 (1998)). The context of the phrase, its practical implications, stated congressional purpose, and this Court's own precedent strongly suggest that "in relation to" operates even more narrowly.

i. The full context of the phrase narrows its meaning.

Section 1028A does not implicate all use of personal identification information "in relation to" a predicate offense—rather, that use must be "*during and* in relation to" that offense. § 1028A(a)(1) (emphasis added). The pairing of "during" and "in relation to" requires that each phrase adopt a distinct meaning to avoid superfluity: "in relation to" therefore cannot mean truly *any* incidental relationship, as that would completely subsume the temporal relationship implied by "during." Rather, the phrase seems to evoke an instrumental relationship, where the use of the identification information contributes meaningfully to the predicate crime.

If "in relation to" requires some instrumental relationship, the question remains what degree of instrumentality suffices. At least five circuit courts have found that the statutory language creates some standard of causation, which may still be "potentially broad when applied to an underlying felony like on-going fraud." *United States v. Gatwas*, 910 F.3d 362, 367 (8th Cir. 2018); *see also United States v. Wedd*, 993 F.3d 104, 122–23 (2d Cir. 2021) ("The language 'during and in relation to' connotes causation."); *Michael*, 882 F.3d at 628 ("The salient point is whether the defendant used the means of identification to further or facilitate the health care fraud."); *United States v. Harris*, 983 F.3d 1125, 1128 (9th Cir. 2020) (finding § 1028A implicated the use of another's identifying information because the defendant's fraud "could not have succeeded otherwise"); *United States v. Munksgard*, 913 F.3d 1327, 1334 (11th Cir. 2019) (quoting *Michael* to find the same). *But see United States v. Dubin*, 27 F.4th 1021, 1043 (5th Cir.

2022) (en banc) (Costa, J., dissenting) (rejecting this "blurry" causation distinction but finding a consent requirement in other statutory language).

Despite Judge Costa's concerns, the most natural reading of "during and in relation to" supports a causation standard. Any difficulty in its application should not deter this Court from applying the best interpretation of the statutory phrase.

ii. The practical implications of a broader reading would prove absurd.

The interpretation of "in relation to" as a broad term would also produce absurd results. With the expansive construction of "use" discussed above, a similarly broad definition of "in relation to" would allow application of the § 1028A sentence enhancement even where the predicate felony has no meaningful relationship to the unlawful use of identity. The bank teller who embezzles, for instance, could receive an extra two years merely because he carries a fake ID in his wallet; the perpetrators of mail fraud would similarly trigger the statute by using a recipient's name, even if that recipient's identity has no connection to the fraud. Such an application grants § 1028A "virtually limitless reach." Pet'r Br. 22. And it risks providing insufficient notice to the average person of a significant criminal penalty.

A more conservative interpretation, by contrast, would limit the § 1028A sentence enhancement only to uses of personal identification information that meaningfully contribute to the underlying crime. Not only does this reading substantially lower the number of acts implicated by § 1028A, but it also logically follows from the text of the provision, thus providing adequate notice to the public. To avoid absurd applications of the statute, this Court should interpret "in relation to" as requiring a substantive connection between the identification information and the predicate crime.

iii. Congressional purpose points to a narrower reading of the provision.

A reading of the statute with Congress's purpose in mind further supports a narrower interpretation of "in relation to." Legislative history indicates that Congress intended harsh punishment for violators of § 1028A. H.R. Rep. No. 108-528, at 4–6 ("Under current law, many perpetrators of identity theft receive little or no prison time. That has become a tacit encouragement to those arrested to continue to pursue such crimes."). But it makes equally clear that Congress was primarily worried about identity theft with a *purpose* of committing other offenses: it enacted the Identity Theft Penalty Enhancement Act, of which § 1028A is a part, to "address[] the growing problem of identity theft" by providing "enhanced penalties for persons who steal identities to commit terrorist acts, immigration violations, firearms offenses, and other serious crimes." *Id.* at 3. A narrower reading of "in relation to," in which the phrase connotes an integral relationship between the stolen identity and the predicate offense, best reflects this congressional concern about the use of stolen information.

iv. This Court's precedent suggests the phrase requires facilitation.

Further, this Court has spoken on the interpretation of "in relation to" in § 924(c)(1), the "cousin" firearm statute discussed in Section I.B above. In *Smith*, the Court held that "'in relation to' requires, at a minimum, that the use facilitate the crime." 508 U.S. at 232. And it further identified the pairing of "during" and "in relation to" as a limitation by Congress on the reach of criminal statutes. *Muscarello*, 524 U.S. at 137 (citing *United States v. Stewart*, 779 F.2d 538, 539 (9th Cir. 1985)).

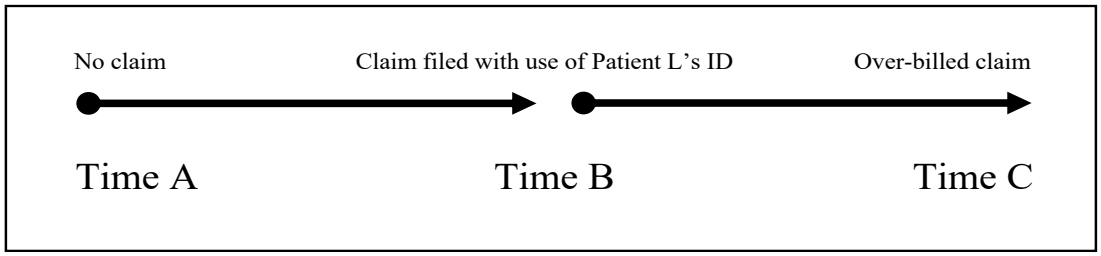
Circuit court judges have applied this reasoning to § 1028A, finding in many cases that "in relation to" creates the causation standards discussed above in Section II.A.i. Yet the application of these standards varies greatly. Notably, the Sixth Circuit has determined that the

causation analogized from *Smith* turns on whether the underlying use of the identification was itself false. The court found that where an ambulance service actually transported patients, but later misrepresented the reasons for and manner of transport in its Medicaid filings, the service did not use the patients' information "in relation to" its Medicaid fraud. *Medlock*, 792 F.3d at 707. But where a pharmacist forged a doctor's signature on a prescription medication insurance claim, and that doctor did not ever issue such a prescription and was not the patient's doctor, the pharmacist was subject to § 1028A's sentence enhancement provision. *Michael*, 882 F.3d at 628–29 ("In one instance, the defendant used the means of identification in spite of the fraud; in the other, she used the means of identification because of the fraud.").

The Sixth Circuit's formulation of "in relation to" extrapolates from this Court's precedent. And it does not bind this Court today. Yet it indicates that the "facilitation" requirement of "in relation to" may be quite limiting on the broader provisions around it in § 1028A. And it provides one workable test that implements the Court's own holding, further strengthening the *stare decisis* effect of *Smith* on this Court's decision.

B. Section 1028A does not implicate Dubin's actions.

Should this Court read a causation requirement into the "in relation to" language of § 1028A, it should find that the statutory sentence enhancement does not apply to Dubin's actions. While the use of Patient L's Medicaid information was necessary for Dubin to be able to perform the overbilling that was his predicate offense, it was the *over*billing—not the billing itself—that was the actual crime. The use of Patient L's information to allow Dubin to bill in the first place was not the offense: had Dubin merely submitted an accurate reimbursement request, he would have committed no crime, though he would not have received reimbursement from Medicaid.



For a better visualization of this argument, consider the graphic above. Imagine if at Time A, Dubin has filed no Medicaid claim. At Time B, Dubin records Patient L's Medicaid information and the correct information for services Dubin's psychological practice actually provided. At this point, Dubin has committed no predicate offense, though he has used Patient L's information. Later, at Time C, Dubin falsifies the previously accurate information in the claim, leading to overbilling. Between Time B and Time C, Dubin has not used Patient L's identifying information in any new or substantive sense to "facilitate" his crime. For such action to be "in relation to" the offense, it must take place between Time B and Time C—that is, *during* the predicate act, and facilitating it.

This is of course an artificial construction. But it helps to visualize how the "in relation to" provision may operate when there is an underlying, legitimate use of the information. Application of a narrow reading of "in relation to" to the facts at issue thus indicates that Dubin did *not* use Patient L's information "in relation to" his Medicaid fraud.

III. Dubin Did Use Another Person's Identity "Without Lawful Authority."

Although Patient L consented to Dubin's use of his Medicaid identification information in the processing of reimbursement requests, Dubin nevertheless used Patient L's identity "without lawful authority." This is true because Patient L did not authorize Dubin to use his information with respect to the activity that constituted healthcare fraud. A text-based reading of

§ 1028A suggests that this Court should read "without lawful authority" as lacking valid consent, a reading that fits well with congressional purpose.

A. The text of Section 1028A supports this interpretation.

Section 1028A prohibits the use "without lawful authority" of a means of identification of another person. The Fifth Circuit suggested that this was because, "[t]hough Dubin was authorized to use Patient L's identifying information, he had no 'lawful' authority to use the information in the manner he did when he committed the felonies for which he was convicted." *Dubin*, 27 F.4th at 1026 (Richman, C.J, concurring). This follows from a plain reading of the text, in which "without lawful authority" naturally modifies "uses," suggesting that there may be individual uses of information that are or are not lawful. Compare this to a reading where "without lawful authority" modifies "means of identification," for instance, implying that authority is given broadly for individual means but not specific uses of those means.

The court went on to suggest that "lawful authority" contemplated that the use of identifying information can be authorized, but that even authorized use can constitute a violation of § 1028A if it is unlawful. *Id*. at 1027 (Richman, C.J., concurring); *see also United States v. Lumbard*, 706 F.3d 716, 725 (6th Cir. 2013); *United States v. Retana*, 641 F.3d 272, 275 (8th Cir. 2011). But the plain text of the statute does not support such a reading: indeed, to read the statute as such would be to read out the term "lawful" entirely, as *any* authorization to use a means of identification in relation to a felony should be unlawful. Rather, "lawful" should be construed to modify "authority" only. So long as authority to use was given lawfully—that is, with appropriate, uncoerced consent—then the user of the means of identification is acting *with* "lawful authority," even if his actions are felonious.

B. Congressional purpose suggests a consent-based reading.

Congress's understood purpose similarly supports a reading of "without lawful authority" as a consent-based restriction. Legislative history provides strong support for a reading of the statute's purpose as an attempt to target identity theft, with a specific focus paid to "persons who *steal* identities to commit terrorist acts, immigration violations, firearms offenses, and other serious crimes." H.R. Rep. No. 108-528, at 3 (emphasis added).

This focus is particularly salient given the apparent lack of language regarding the *theft* of identities in the current text of the statute. It may make sense, then, to infer that the backdrop of congressional purpose informs the meaning of "without lawful authority." This would support the argument that "without lawful authority" should be read in such a way that pays attention to the consent of the owner of the means of identification—the statute would then protect against the involuntary use of an individual's information, while excluding those who use such information with the owner's consent. Because Dubin used Patient L's information without his consent with respect to the healthcare fraud, Dubin thus acted "without lawful authority."

CONCLUSION

For the foregoing reasons, I recommend **reversing the judgment of the court below**.

Applicant Details

First Name	**Stefan**
Middle Initial	**A**
Last Name	**Pruessmann**
Citizenship Status	**U. S. Citizen**
Email Address	**stefan.a.pruessmann@vanderbilt.edu**
Address	**Address** Street **318 Village at Vanderbilt** City **Nashville** State/Territory **Tennessee** Zip **37212** Country **United States**
Contact Phone Number	**8044779199**

Applicant Education

BA/BS From	**College of William and Mary**
Date of BA/BS	**May 2021**
JD/LLB From	**Vanderbilt University Law School** **http://law.vanderbilt.edu/employers-cs/judicial-clerkships/index.aspx**
Date of JD/LLB	**May 10, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Vanderbilt Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Enix, Amy
amy.enix@vanderbilt.edu
Sharfstein, Daniel
daniel.sharfstein@vanderbilt.edu
615-322-1890
Armstrong, Kevin
kevin.armstrong@fultoncountyga.gov

This applicant has certified that all data entered in this profile and any application documents are true and correct.

STEFAN A. PRUESSMANN
4728 Rollingwood Lane, Glen Allen, Virginia 23060
804-477-9199 | stefan.a.pruessmann@vanderbilt.edu

June 12, 2023

Judge Jamar K. Walker
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, Virginia 23510

Dear Judge Walker:

I am writing to apply for a 2024-25 term clerkship in your chambers. I am a third-year student at Vanderbilt Law School and a Managing Authorities Editor for the VANDERBILT LAW REVIEW. As a Virginia native, I intend to return and practice in Virginia. I am interested in clerking for you in particular because of your status as a Virginia native.

I believe that I would make a strong addition to your chambers. I am currently interning for Judge Curtis L. Collier in the U.S. District Court for the Eastern District of Tennessee. I enjoy working closely with Judge Collier and his clerks in a variety of civil and criminal matters. I am learning the importance of thorough research, precise analysis, and clear writing. This experience has demonstrated to me the importance of collegiality and civility. Additionally, I was selected to be a Managing Authorities Editor for the VANDERBILT LAW REVIEW because of my attention to detail and thoroughness.

Enclosed is my resume, law transcript, writing sample, and letters of recommendation from Professors Sharfstein and Enix as well as Kevin Armstrong of the Fulton County District Attorney's Office. Please contact me if you need any additional information. Thank you for your consideration.

Respectfully,

Stefan Pruessmann

STEFAN A. PRUESSMANN

4728 Rollingwood Lane, Glen Allen, Virginia 23060
stefan.a.pruessmann@vanderbilt.edu
804-477-9199

EDUCATION

Vanderbilt Law School Nashville, Tennessee
J.D. Candidate, May 2024
GPA: 3.650
Honors & Activities: VANDERBILT LAW REVIEW, Managing Authorities Editor; Dean's List; Chancellor's Law Scholar; Dean's Leadership Award; Phi Delta Phi; Jurists on the Go, Secretary; Asian Pacific American Law Student Association; Opening Statement.

College of William & Mary Williamsburg, Virginia
B.A., History and Government, May 2021
Honors & Activities: Dean's List; Filipino American Student Association, D7 Representative; William & Mary D.C. Summer Institute, American Politics Fellow.
Thesis: *The Discrepancy Between Filipino and Filipino-American Memories of Marcos*

EMPLOYMENT

U.S. District Court, Eastern District of Tennessee Chattanooga, Tennessee
Judicial Intern: Summer 2023
Worked with Judge Curtis L. Collier and his clerks on civil and criminal cases. Prepared change of plea colloquies. Drafted memos with recommendations regarding sentencing and summary judgment motions. Proofread drafts by pro se law clerks.

Fulton County District Attorney's Office Atlanta, Georgia
Intern: Summer 2022
Worked with Case Intake to prepare criminal cases for indictment by a grand jury. Evaluated initial charges and recommended adjustments when necessary. Used Odyssey and Evidence.com to prepare cases and retrieve necessary information respectively. Worked with Appeals on cases involving pro se appellants. Wrote responses to motions for new trial, proposed orders dismissing motions, and motions to dismiss.

Congressman A. Donald McEachin Richmond, Virginia
District Intern: Spring 2020 (ended prematurely due to COVID-19 pandemic)
Researched district outreach opportunities. Assisted constituents in casework process.

PERSONAL

Languages: German (A2 proficiency). Enjoy: cycling, hiking, vexillology, learning to play golf.

REFERENCES

Daniel Sharfstein, Dick and Martha Lansden Chair in Law, Vanderbilt Law School, Daniel.sharfstein@vanderbilt.edu, 615-322-1890
Kevin Armstrong, Deputy District Attorney—Appeals, Fulton County District Attorney's Office, kevin.armstrong@fultoncountyga.gov, 912-223-5436
Amy Enix, Instructor in Law, Vanderbilt Law School, amy.enix@vanderbilt.edu, 615-343-1876

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to you on behalf of Mr. Stefan Pruessmann, who is applying for a federal judicial clerkship. I have been in the legal profession for eight years, as a judicial clerk for the Hon. Marcia Phillips Parsons, an associate attorney, and now a legal writing instructor and the Assistant Director of Legal Research and Writing at Vanderbilt University Law School. I highly recommend Mr. Pruessmann for a judicial clerkship.

During the 2021-22 academic year Mr. Pruessmann was a student in my Legal Writing I and II classes, the traditional first year legal research and writing classes. Although Mr. Pruessmann struggled in the early part of fall 2021, he quickly found his footing and excelled. By the end of the Spring 2022 semester, Mr. Pruessmann was one of my best students, and received the second-highest score on his Appellate Brief. With the small class-sizes of Vanderbilt's legal writing sections, Mr. Pruessmann's ability to move from an A- in the fall to an A in the spring, with the second-highest overall score in his class, is truly impressive, and not something I often see. Mr. Pruessmann has demonstrated the ability to accept and absorb constructive criticism without taking it personally, and he used my early written and verbal feedback to move from the bottom of the class after the first graded assignment, to the top of the class after the final graded assignment in the fall.

In the classroom setting, Mr. Pruessmann consistently offered valuable insights and demonstrated his thorough preparation. He also demonstrated an ability to work well with others, collaborating with his classmates during group work and conducting himself with professionalism. In one-on-one meetings, Mr. Pruessmann always asked thoughtful questions about the material and demonstrated a thorough understanding of the law. He also pays close attention to detail and would notice things in the writing assignment prompt or record that other students did not, using those details to help strengthen his legal argument. This attention to detail was also reflected in his bluebook and formatting scores, which were always high. As surprising as it may seem, this attention to detail was also evident in the fact that Mr. Pruessmann was also one of the few students to routinely submit papers free from typographical errors. I very much enjoyed working with Mr. Pruessmann during the 2020-21 school year, finding him to be an exemplary student, and believe he will excel as a judicial clerk.

I am confident that Mr. Pruessmann's analytical skills, coupled with his eagerness to learn and improve, would be an asset to your chambers. If I can be of further assistance, please feel free to contact me either via telephone, (203) 232-0773, or e-mail, amy.enix@vanderbilt.edu.

Best regards,

Amy Bergamo Enix
Instructor of Law
Assistant Director of Legal Research & Writing
Vanderbilt University Law School

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

It is my great pleasure to write this letter in support of Stefan Pruessmann's application for a judicial clerkship. Stefan was my student in the spring of 2022 in first-year Property, which had an enrollment of fifty-three. In classroom discussion, conversations during office hours, and at screenings of property-related movies that I organized all spring, I got to know Stefan well. He stood out for his stellar legal mind, intellectual curiosity, and boundless enthusiasm. I am confident that he will be a superb law clerk.

In Property, Stefan performed brilliantly. He volunteered often in class, and I found that I consistently learned from his incisive, thoughtful, and even witty comments about doctrine and policy questions. He frequently visited office hours and sent me terrific links to current news stories dealing with concepts that we were learning in class. His exam was one of the top seven exams in the class, a high A- on our uncompromising grading curve. It was a tightly argued set of essays about a statute allowing affordable housing uses to nullify residential covenants and about a recent case involving a proposal to use private eminent domain to run a gas pipeline through a Memphis neighborhood that had been founded after the Civil War by Black army veterans and their families. Stefan showed excellent command of a broad range of property doctrines and theoretical concepts, and in just about any other year his exam would have been an A. He identified key issues; his analysis was sharp and thickly textured; and his writing was clear.

Based on his performance in Property, I am entirely unsurprised that Stefan is having a stellar career at Vanderbilt. He has excellent grades, with a particularly notable spring 1L term (the most difficult and demanding semester at Vanderbilt). While his grades took a small dip this past fall while he was figuring out how to manage his schoolwork alongside Law Review, he bounced back in the spring with some of his best grades. He also participates robustly in a wide range of extracurriculars, including the Law Review as Managing Authorities Editor as well as the Asian Pacific Law Students Association (Stefan is part Filipino and in college wrote his senior thesis about the historical memory of the Marcos years, an area of expertise that became highly relevant during the recent presidential election), Vanderbilt's organization for first-generation law students, and our club for law student runners. Last summer, he did an externship with the district attorney's office in Atlanta, and this summer, he is a judicial intern for the Hon. Curtis Collier in the U.S. District Court in Chattanooga. Eventually he hopes to have a career doing litigation and appellate work in Washington, D.C. The delight Stefan takes in studying law and being a part of Vanderbilt's intellectual community is evident. The quality of his work and the way he is thriving here lead me to believe that as a law clerk, he will be someone whom a judge can trust to handle any case, big or small, with superior skill, sensitivity, and, above all, judgment.

Stefan's legal and intellectual talents are matched by his lovely personal qualities. He is a happy and optimistic person who has real intellectual curiosity while remaining appealingly down to earth. While the spring term of the first year can be a pressure cooker, a time when many students lose perspective, Stefan rose to the moment, unruffled and with his terrific sense of humor very much intact. When I organized extracurricular, entirely voluntary screenings of property-related movies throughout the spring term, Stefan helped suggest films and actively participated in wonderful conversations afterwards. In fact, I have enjoyed every conversation I have had with him. Based on my own experience as a law clerk, I know that Stefan will be a true joy to have in chambers—someone who is excellent at his job and a gem of a colleague. I give him my highest recommendation, with no reservations. If you would like to talk more about Stefan, please do not hesitate to contact me by phone, 615-322-1890, or by email, daniel.sharfstein@vanderbilt.edu.

Sincerely,

Daniel J. Sharfstein

Dick and Martha Lansden Professor Law and Professor of History
Director, George Barrett Social Justice Program

June 12, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am the deputy district attorney who supervises the Appeals Unit for the largest prosecutor's office in the State of Georgia. Mr. Stefan A. Pruessmann worked under my supervision as an intern for the Appeals Unit for one-half of the summer of 2022.

My direct exposure with Mr. Pruessmann's work product is somewhat limited. However, that work product I did encounter was very good for a law student between their first and second years. The reason my exposure to Mr. Pruessmann's work product is limited is because he did work for the unit generally and not just for me specifically. I have spoken with two other attorneys for whom Mr. Pruessmann performed work, and each has responded positively.

On such attorney wrote:

Mr. Pruessmann assisted me with drafting responses and proposed orders on several pro se cases. He did a good job—his work was accurate, he asked pertinent questions and sought clarification where needed, and he produced the work when I needed it. It was a pleasure to work with him and I would definitely work with him again.

Another wrote:

Stefan undertook a legal research project at my request and timely provided a detailed report of his findings, which I used in drafting a response to a pro so motion for new trial.

His research was focused and yielded citations to several key authorities relevant to the question at hand. His analysis was cogent and showed an appreciation for the granular details of each case as well as the big picture.

Moreover, it should be noted that Mr. Pruessmann did not simply wait around to be assigned work; when he was available to do additional work, he showed initiative and actively sought out additional assignments.

Interpersonally, I interacted with Mr. Pruessman on a daily or near-daily basis. I find him to be good-natured, respectful, and an enjoyable person to work with in a legal setting.

I would recommend Mr. Pruessman for future internships or clerkships.

Sincerely,

Kevin Armstrong

Kevin Armstrong - kevin.armstrong@fultoncountyga.gov

Stefan Pruessmann Writing Sample

The following writing sample is an excerpt of my submission for the Motion Brief II assignment. I extracted the argument section from the assignment to conform to the standard writing sample length of approximately 10 pages. The text is unedited. If the rest of the assignment is desired, such as the statement of facts to provide further context, I will happily provide it. The original full assignment can also be provided if necessary. Citations to cases deviate somewhat from the Bluebook due to the rules of the assignment.

The assignment was to prepare a motion for partial summary judgment on the plaintiff's claim of gender discrimination, on the grounds that the plaintiff failed to provide sufficient direct or indirect evidence to survive summary judgment.

ARGUMENT

Defendant is entitled to summary judgment on Plaintiff's gender discrimination claim because Plaintiff has provided insufficient direct or indirect evidence to establish her claim.

Defendant's motion for summary judgment should be granted because Plaintiff has failed to provide direct or indirect evidence of discrimination. See Wright v. Southland Corp., 187 F.3d 1287, 1293 (11th Cir. 1999). To establish a *prima facie* claim of employer discrimination against a class protected under Title VII like gender, a plaintiff must provide either direct or indirect evidence of employer discrimination. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1); see Damon v. Fleming Supermarkets of Fla., Inc., 196 F.3d 1354, 1358 (11th Cir. 1999). If a plaintiff does not satisfy this burden, then summary judgment must be granted to the defendant. See Lewis v. City of Union City, 918 F.3d 1213, 1220 (11th Cir. 1999).

Summary judgment must be granted when the movant shows "there is no genuine dispute as to any material fact" and that they are "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Plaintiff has failed to establish her discrimination claim by providing either (1) direct evidence of unambiguous discriminatory intent or (2) indirect evidence of favorable treatment of valid comparators outside of plaintiff's protected class. See Damon, 196 F.3d at 1358-59; Lewis, 918 F.3d at 1220-21. Because of this, WGCX is entitled to summary judgment on Plaintiff's gender discrimination claim. Fed. R. Civ. P. 56(a); see Lewis, 918 F.3d at 1220.

A. Plaintiff has not provided direct evidence of discrimination because she has not shown that her termination was driven by gender discrimination.

To establish a discrimination case using direct evidence, a plaintiff must provide evidence that shows the employment decision in dispute was motivated by discriminatory intent. See Damon, 196 F.3d at 1358-59. Plaintiff has not shown that her termination was influenced by discrimination beyond her own interpretation of certain remarks. See id.; Wright, 187 F.3d at 1306.

A plaintiff relying on direct evidence must show that the people behind the disputed employment decision were driven by discriminatory intent. See Wright, 187 F.3d at 1303-04. In Wright, a former 7-11 manager named James Wright ("Wright") sued his former employer, the Southland Corporation ("Southland"), for alleged age discrimination in his termination. Id. at 1288-89. However, Southland said that his firing was driven by Wright's rule violations and loss of merchandise. Id. at 1289. A district court grant of summary judgment to Southland for lack of direct evidence was reversed by the 11th Circuit, which found that remarks by Wright's superiors questioning his ability to work given his advanced age constituted sufficient direct evidence to survive summary judgment. Id. at 1303-05. Two work remarks were cited: one recommending that Wright retire due to his age and resulting inability to use computers, and one stating that Wright was too old. Id. at 1303-04. The superiors that made the remarks fired Wright several months later. Id. at 1304. Although Wright's termination cited his many work problems, the court said that the discriminatory remarks by those behind Wright's termination

meant a jury could reasonably find that the decision was caused by age discrimination, proscribing summary judgment. Id. at 1304-05.

For remarks to constitute direct evidence of discrimination, they must be so clearly discriminatory that there is no other possible intent. See Damon, 196 F.3d at 1359. In Damon, Walter Damon ("Damon") and Richard Kanafani ("Kanafani"), two Fleming store managers, sued their former employer Fleming for alleged age discrimination behind their terminations. Id. at 1357. One year after becoming district manager, Harry Soto ("Soto") fired five managers that were over forty years old, including the plaintiffs, and replaced them with managers that were under forty years old. Id. The plaintiffs presented as direct evidence of discrimination a comment by Soto following Kanafani's termination, which stated that Fleming needed "aggressive *young* men like [Kanafani's replacement] to be promoted." Id. at 1359. The court found that the remark was insufficient for direct evidence since the remark required an inference of discrimination against Kanafani, rather than explicitly expressing discriminatory animus, and in similar cases the court had refused to classify comments suggesting but not proving discrimination as direct evidence. Id.

Plaintiff's proffered evidence does not qualify as direct evidence of discrimination because there are no blatantly discriminatory remarks by the people responsible for her termination, Napier and Penningsworth. See Wright, 187 F.3d at 1303-04; Damon, 196 F.3d at 1359.

Plaintiff has not provided evidence that Napier or Penningsworth, the people behind her termination, possessed or were driven by discriminatory intent when they fired her. See Wright, 187 F.3d at 1303-04. The only remarks by Penningsworth regarding Plaintiff discuss her in terms of her ratings and strongest viewer demographics, with no mention of her gender or any impact it had on her job performance. (Penningsworth Decl. ¶¶ 11-12.) As for Napier, only one comment could possibly be interpreted as discrimination based on Plaintiff's gender: his Fourth of July remark calling Plaintiff a washed-up cow. (Napier Dep. 6.) However, in Wright one of Wright's supervisors recommended his retirement due to his age and the second one told another worker that he was looking for a younger store manager to replace Wright for being too old. 187 F.3d at 1303-04. In contrast, Napier's comment did not involve Plaintiff's current job performance and was not made at work to a WGCX employee. (Napier Dep. 5-6.) Napier only discussed his opinion of Plaintiff's appearance and her long career with a non-employee outside of working hours. (Napier Dep. 5-6.) Unlike Wright, it cannot be said that the people responsible for Plaintiff's termination thought that Plaintiff should not be employed because of her gender. See 187 F.3d at 1304.

Plaintiff has failed to provide evidence of blatantly discriminatory remarks with no other possible intent that could constitute direct evidence of discrimination. See Damon, 196 F.3d at 1359. While Napier's comment at the Fourth of July picnic was unprofessional, it is not clear that gender discrimination is the only possible intent. (Napier Dep. 6.) In Damon, the man that fired Damon then told Damon's

replacement that the company needed "aggressive young men" to be promoted, but the court did not view that as direct evidence since an inference of discrimination against Damon was still required. 196 F.3d at 1359. Similarly, Napier's comment could have been just "guy talk" with no impact on Plaintiff's career, especially since the comment was made at an event outside of work while inebriated. (Napier Dep. 6.) Napier's comments on "the heat at 11:00 in August" and Plaintiff's once-successful career could also suggest that Napier's description of Plaintiff was due to frustration with her subpar ratings and bovine stubbornness compared to Quint, with whom Plaintiff shares a gender. (Napier Dep. 6; Penningsworth Decl. Ex. B.) All of this is further complicated by Plaintiff's refusal to find further context for Napier's overheard remarks, which could have provided clarity to her. (Kile Dep. 4.)

Because Plaintiff has not provided evidence of unambiguous discriminatory comments by her bosses Napier and Penningsworth affecting her termination, Plaintiff has not met the 11th Circuit's rigorous standard for direct evidence and can only rely on indirect evidence. See Damon, 196 F.3d at 1359.

B. Plaintiff has not provided sufficient indirect evidence of discrimination because Plaintiff relies upon an invalid comparator.

If a plaintiff cannot establish their employment discrimination case through direct evidence, they may attempt to use indirect evidence via the McDonnell Douglas test. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); see Damon, 196 F.3d at 1358. To pass this test, a plaintiff must first show that (1) they are in a protected class, (2) they were subjected to an adverse employment action,

(3) they were qualified for their job, and (4) their employer treated "similarly situated" employees of a different class more favorably. Lewis, 918 F.3d at 1220-21. WGCX accepts that Plaintiff's gender is a protected class and that her termination was an adverse employment action. § 2000e-2(a)(1). WGCX also acknowledges that holding a job for over a decade establishes qualification for said job and that Plaintiff was an anchor since 1995. (Compl. ¶ 11); see Damon, 196 F.3d at 1360 (explaining that if a plaintiff has held a position for a long time, then they are qualified for said position). However, Plaintiff has not satisfied the fourth prong of showing "similarly situated" employees of a different gender receiving favorable treatment, since her co-worker is not "similarly situated in all material respects." See Lewis, 918 F.3d at 1228.

To determine which employees are similarly situated, four kinds of similarities are sought: engaging in the same conduct or misconduct as plaintiff, being subject to the same employment policy, sharing the same supervisor, and similar employment or disciplinary history. Id. at 1227-28. This standard removes all nondiscriminatory reasons for an employer's action and allows for summary judgment for employers in cases where a plaintiff's comparators are too dissimilar to permit an inference of discrimination. Id. at 1228-29. Because Plaintiff relies on a comparator that is not similarly situated in all material respects, WGCX is entitled to summary judgment. See id. at 1229; Lathem v. Dep't of Child. & Youth Servs., 172 F.3d 786, 793 (11th Cir. 1999).

If employees of different classes are subjected to different policies due to different characteristics of each employee, then the employees are not sufficiently similarly situated to support a discrimination claim. Lewis, 918 F.3d at 1230-31. In Lewis, the plaintiff policewoman ("Lewis") brought a discrimination claim against her employer after her termination. Id. at 1219. Lewis had a permanent heart condition that prevented her from completing weapons training, so she was placed on paid leave until she completed certain paperwork, but she used up her leave before she did the paperwork. Id. at 1219, 1230. Her employer fired her under the Personnel Policy for an unapproved leave of absence. Id. at 1219. In her claim, Lewis alleged that two white policemen failed physical tests and were placed on administrative leave and given more opportunities to return to work. Id. One policeman failed a balance test, was given ninety days of leave to fix the relevant problem, and passed the test on a second attempt within ninety days. Id. The other policeman failed an agility test, was also given ninety days of leave to fix the relevant problem, and was eventually fired after failing to demonstrate his fitness to be a field policeman. Id. Both were placed on unpaid leave under the "Physical Fitness/Medical Examinations" policy, which did not exist during Lewis's tenure. Id. at 1230. The court found that the policemen were not similarly situated with Lewis and could not be used as comparators, since Lewis was placed on leave for a permanent condition and fired under the Personnel Policy while the policemen were placed on leave for theoretically fixable problems under a later different physical policy. Id.

If employees of different classes commit the same misconduct but receive different punishments, then they are similarly situated but receive different treatment and a *prima facie* case of discrimination is established. See Lathem, 172 F.3d at 793. In Lathem, a female juvenile intake officer ("Lathem") filed a discrimination claim against her employer ("DCYS") after being terminated for violation of DCYS rules against fraternization with clients and for refusing to cooperate with DCYS's investigation. Id. at 789-90. Lathem alleged that Larry Smith ("Smith"), Lathem's male superior, also violated anti-fraternization rules but was transferred rather than terminated. Id. at 790. The court found that Lathem and Smith were similarly situated because they committed similar infractions and that DCYS's failure to explain the discrepancy between their punishments meant that Lathem established a *prima facie* claim of discrimination. Id. at 793.

Plaintiff's indirect evidence is insufficient because her sole named male comparator, Wane, is not similarly situated in two respects: being subject to the same policy and engaging in the same misconduct as Plaintiff. (Compl. ¶ 16); see Lewis, 918 F.3d at 1227-28; Lathem, 172 F.3d at 793.

Plaintiff is not similarly situated with Wane because they were not subject to the same policy due to differing characteristics. (Napier Dep. 4); see Lewis, 918 F.3d at 1227-28. Napier gave each on-screen person recommendations for improvements that were tailored to each person's individual weaknesses. (Napier Dep. 4.) Just as Lewis and the white policemen were subjected to different policies for different problems, Plaintiff and Wane were given different recommendations for different

flaws. Lewis, 918 F.3d at 1230; (Napier Dep. 4.) Wane was not recommended plastic surgery because he had already had work done, unlike Plaintiff. (Wane Dep. 4; Kile Dep. 3.) Additionally, the directives were meant to improve anchor ratings following RCC's report, and Wane and Plaintiff performed better with different genders and age groups, so their directives differed. (Napier Dep. 4.) Because they were subjected to different directives for different reasons, Plaintiff and Wane are not similarly situated. (Napier Dep. 4); see Lewis, 918 F.3d at 1231.

Plaintiff is not similarly situated with Wane because they did not engage in the same misconduct. (Kile Dep. Ex. A); see Lathem, 172 F.3d at 793. Available evidence shows Plaintiff quit her makeover regimen but does not show similar behavior from Wane or other WGCX employees. (Napier Dep. 6.) Lathem and Smith both violated DCYS anti-fraternization rules but received different punishments, while only Plaintiff disobeyed Napier's directives. Lathem, 172 F.3d at 793; (Kile Dep. Ex. A.) Even when Plaintiff obeyed she resisted most of her advisers, laughed at the hair stylist, and only worked with the speech coach and personal trainer. (Napier Dep. 5.) Since Plaintiff quit her assigned directive while Wane fulfilled his, they did not engage in the same misconduct.

Because Plaintiff has not provided a similarly situated male comparator, she has provided insufficient indirect evidence to establish a *prima facie* case of discrimination and WGCX should receive summary judgment on this claim. See Lewis, 918 F.3d at 1229, 1231.

Applicant Details

First Name	**Johnna**
Last Name	**Purcell**
Citizenship Status	**U. S. Citizen**
Email Address	**jfp93@cornell.edu**
Address	**Address** Street **910 M St NW, 802** City **Washington** State/Territory **District of Columbia** Zip **20001** Country **United States**
Contact Phone Number	**7248126257**

Applicant Education

BA/BS From	**Pennsylvania State University-University Park**
Date of BA/BS	**May 2018**
JD/LLB From	**Cornell Law School** **http://www.lawschool.cornell.edu**
Date of JD/LLB	**May 30, 2021**
Class Rank	**30%**
Law Review/Journal	**Yes**
Journal(s)	**Cornell Journal of Law and Public Policy**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Cornell Law Internal Moot Court**

Bar Admission

Admission(s)	**District of Columbia**

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Rana, Aziz
ar643@cornell.edu
607-255-5423
Goldberg, Rachel
rtg67@cornell.edu
Wesley, Richard
Rcw64@cornell.edu
5852437910

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Johnna Purcell
910 M Street NW, Unit 802
Washington DC, 20001

April 19, 2023

The Honorable Jamar K. Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA

Dear Judge Walker,

My name is Johnna Purcell and I am writing to apply for a clerkship in your chambers for your 2024 term or any term thereafter. I am a 2021 graduate of Cornell Law School. Currently, I am an Associate at Pillsbury Winthrop Shaw Pittman LLP in Washington, D.C. At Pillsbury, my practice is varied and includes matters related to public policy, regulatory compliance, white collar litigation, and government investigations. While at Pillsbury, I have had the opportunity to assist with several government investigations and white collar criminal defense matters. My exposure to these issues has bolstered my interest in pursuing a career in government service as a trial attorney. I hope that clerking for a district court will provide for further exposure to the complex legal issues trial attorneys regularly work on, as well as the opportunity to observe and learn from the judges and lawyers practicing in the court.

As a current resident of Washington, D.C. and native of Southwestern Pennsylvania, I have a special interest in clerking in the Eastern District of Virginia and plan to practice in either Washington, D.C. or Virginia long-term.

A resume, law school transcript, and writing sample are enclosed. Cornell Law School will separately forward you three letters of recommendation: (1) from US Court of Appeals for the Second Circuit Judge Richard C. Wesley and Professor John Blume, (2) from Professor Aziz Rana, and (3) from Professor Rachel Goldberg.

Please do not hesitate to contact me should you have any questions or need any additional information. Thank you for your consideration.

Sincerely,

Johnna Purcell

Johnna Purcell

910 M Street NW, Unit 802, Washington, D.C., 20001 | 724-812-6257 | jfp93@cornell.edu

EDUCATION:

Cornell Law School — **Ithaca, NY**

J.D., Concentration in Public Law, *cum laude* — May 2021

GPA: 3.66

Honors: CALI Excellence for the Future Award for Citizenship and American Constitutional Thought, Spring 2020; Professional Development Orientation Fellow, Fall 2020; Dean's List: Fall 2019 and Fall 2020.

Journal: Senior Editorial Board (Membership Director) of Volume 30 of the Cornell Journal of Law and Public Policy

Moot Court: Executive Bench Editor for the Cornell Law School Moot Court Board, 2020–21; Second Place Brief in 2019 Cuccia Moot Court Competition; Two Time Top 16 Finisher in Moot Court Competitions.

Activities: Chair of the Public Interest Law Union's Annual 2020 Cabaret Event; President of Society of Wine and Jurisprudence, 2019-2020 school year; Semi-Finalist in the 2021 Internal Mock Trial Competition

Publications: Johnna Purcell, Note, *A Switch in Time to Destroy Nine,* 30 CORNELL J. L. PUB. POL'Y 611 (Spring 2020).

The Schreyer Honors College at the Pennsylvania State University — **University Park, PA**

BA, Political Science and Global and International Studies, *magna cum laud*e — May 2018

Honors: Student Marshal for Department of Global and International Studies' 2018 Graduating Class

Thesis: *Comprehensive Sexual Education Policy and Public Health Outcomes*

Activities: College Democrats: Pennsylvania Central Vice President and Penn State Executive Vice President; Student Government: At-Large Representative and Associate Justice of the Judicial Board.

Publications: Nichola Gutgold and Johnna Purcell, *I'm in and I'm in to Win: The 2008 and 2016 Internet Announcement Videos of Hillary Clinton for President,* 9 MEDIA STUDIES 17 (Aug. 23, 2018); Nichola Gutgold and Johnna Purcell, *Why can't Hillary connect with young voters?*, PENN LIVE (Feb. 21, 2016).

RELEVANT EXPERIENCE:

Pillsbury Winthrop Shaw Pittman, LLP — **Washington, D.C**

Associate — October 2021 - Present

Summer Associate — June 2020 - August 2020

- Assists in performing federal government relations, lobbying, and advocacy for a variety of clients including cybersecurity technology developers, universities, municipalities, and critical infrastructure providers.
- Represents clients to develop and file applications with the Department of Homeland Security to receive anti-terrorism technology liability protections through the SAFETY Act.
- Conducts legislative research and drafts federal legislation on behalf of clients in the education, professional certification, financial services, national defense, and critical infrastructure sectors.
- Supports the White Collar Litigation and Government Investigations teams on several investigations and a pending trial by conducting legal research, assisting in discovery and fact development, drafting motions, and supporting efforts to prepare clients for interviews with prosecutors.

Cornell Law Lawyering Program **Ithaca, NY**
Legal Writing Honors Fellow August 2019 – May 2020

- Selected by the first legal writing program to serve as an Honors Fellow at the end of first year of law school based on academic and legal writing ability and aptitude for working with other students.
- Assisted in instructing first year legal writing students by providing written critiques on assignments, holding office hours and conferences with students to discuss legal writing techniques, and supervising student oral arguments and presentations.

Pennsylvania Governor's Office of General Counsel **Harrisburg, PA**
Legal Extern | Office of Chief Counsel for the Department of State May 2019 - August 2019

- Supported lawyers that represent the Secretary of the Commonwealth in areas relating to elections, professional licenses, corporate registration, and the State Athletic Commission.
- Conducted legal and legislative research for election law attorneys on issues including the campaign finance provisions of the Pennsylvania Election Code, constitutional and statutory regulations for ballot referendums, and requirements for absentee ballots.
- Assisted in reviewing petitions and drafting decisions in administrative adjudications on behalf of the Secretary of State regarding notary licensure disciple.

Marc Friedenberg for Congress **State College, PA**
Volunteer Operations Coordinator January 2018 - May 2018
Campaign Manager May 2018 - September 2018

- Worked, as a paid campaign staffer, to coordinate over fifty volunteers in the execution of a comprehensive "get out the vote" strategy during the 2018 PA Democratic Primary, resulting in a victory in a highly-competitive election.
- Created and executed field, media, messaging, and fundraising strategies for the general election.
- Managed a team of three paid staff members, a fifteen-member campaign committee, and ten interns.

The Democratic National Committee **Washington, D.C.**
Operations Intern May 2017 - August 2017

- Coordinated directly with the DNC's Chief Operating Officer and Operations Director on daily tasks and special projects crucial to the DNC's day-to-day operations.

United States Senate | Office of Senator Robert P. Casey Jr. **Washington, D.C.**
Legislative Intern | Healthcare and Children's Policy Area. May 2016 - July 2016

- Drafted four letters to constituents about pending legislation and three memos on congressional hearings.
- Conducted legislative research projects on issues including the Affordable Care Act and sexual education policy.

ADDITIONAL EXPERIENCE:

Frank Lloyd Wright's Fallingwater **Mill Run, PA**
Visitor Service Representative May 2014 – June 2017

- Worked as a seasonal employee in the Visitor Services Department at the museum and grounds of world-renowned American architect Frank Lloyd Wright's Fallingwater.

INTERESTS:

Baking, running, wine tasting, Penn State football.

Cornell Law School - Grade Report - 12/13/2022

Johnna F Purcell

JD, Class of 2021

Course	Title	Instructor(s)	Credits	Grade	
Fall 2018 (8/21/2018 - 12/17/2018)					
LAW 5001.2	Civil Procedure	Clermont	3.0	A	
LAW 5021.4	Constitutional Law	Rana	4.0	A-	
LAW 5041.3	Contracts	Rachlinski	4.0	B+	
LAW 5081.6	Lawyering	Goldberg	2.0	A-	
LAW 5121.2	Property	Sherwin	3.0	B+	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	16.0	16.0	16.0	16.0	16.0	16.0	3.5831
Cumulative	16.0	16.0	16.0	16.0	16.0	16.0	3.5831

Spring 2019 (1/15/2019 - 5/14/2019)					
LAW 5001.2	Civil Procedure	Gardner	3.0	B	
LAW 5061.2	Criminal Law	Margulies	3.0	A-	
LAW 5081.6	Lawyering	Goldberg	2.0	A-	
LAW 5151.3	Torts	Siliciano	3.0	A	
LAW 6401.1	Evidence	Weyble	3.0	A-	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	14.0	14.0	3.5971
Cumulative	30.0	30.0	30.0	30.0	30.0	30.0	3.5896

Fall 2019 (8/27/2019 - 12/23/2019)					
LAW 6011.1	Administrative Law	Macey	3.0	B+	
LAW 6881.650	Supervised Writing/Teaching Honors Fellow Program	Mooney	2.0	SX	
LAW 6921.1	Trial Advocacy	Weyble	5.0	A-	
LAW 7052.101	Adv. Per. Writing and Oral Advocacy	Bryan	3.0	A	
LAW 7923.301	Protest and Civil Disobedience Defense Practicum 1	Gibson	4.0	A	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	17.0	17.0	17.0	17.0	15.0	15.0	3.7560
Cumulative	47.0	47.0	47.0	47.0	45.0	45.0	3.6451

^ Dean's List

Spring 2020 (1/21/2020 - 5/8/2020)

Due to the public health emergency, spring 2020 instruction was conducted exclusively online after mid-March and law school courses were graded on a mandatory Satisfactory/Unsatisfactory basis. Four law school courses were completed before mid-March and were unaffected by this change. Other units of Cornell University adopted other grading policies. Thus, letter grades other than S/U appear on some spring 2020 transcripts. No passing grade received in any spring 2020 course was included in calculating the cumulative merit point ratio.

LAW 6340.1	Energy Law	Macey	3.0	SX	
LAW 6441.1	Federal Income Taxation	Elkins	3.0	SX	
LAW 6871.607	Supervised Writing	Lyon	2.0	SX	
LAW 6881.650	Supervised Writing/Teaching Honors Fellow Program	Goldberg	2.0	SX	
LAW 7283.101	Citizenship in American Constitutional Thought	Rana	3.0	SX	CALI
PE 1545.1	Beginning Figure Skating	Essigmann	0.0	SX	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	13.0	13.0	13.0	13.0	0.0	0.0	N/A
Cumulative	60.0	60.0	60.0	60.0	45.0	45.0	3.6451

Fall 2020 (8/25/2020 - 11/24/2020)					
LAW 6263.1	Criminal Procedure - Adjudication	Blume	3.0	A-	
LAW 6641.1	Professional Responsibility	Wendel	3.0	A-	
LAW 7260.101	Federal Appellate Practice	Blume/Wesley	4.0	SX	
LAW 7924.301	Protest and Civil Disobedience Defense Practicum 2	Gibson	4.0	A	

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	14.0	14.0	14.0	14.0	10.0	10.0	3.8020
Cumulative	74.0	74.0	74.0	74.0	55.0	55.0	3.6736

^ Dean's List

Spring 2021 (2/8/2021 - 5/7/2021)

LAW 6070.1	Federal Policy Making	Simonetta	1.0	SX
LAW 6361.1	Environmental Law	Rachlinski	3.0	A-
LAW 6431.1	Federal Courts	Dorf	4.0	B+
LAW 7691.101	Money Talks: Amping Up Political Speech Under the First Amendment	Danks Burke	3.0	A

	Total Attempted	Total Earned	Law Attempted	Law Earned	MPR Attempted	MPR Earned	MPR
Term	11.0	11.0	11.0	11.0	10.0	10.0	3.6330
Cumulative	85.0	85.0	85.0	85.0	65.0	65.0	3.6673

Total Hours Earned: 85

Received JD cum laude on 05/30/2021

Undergraduate Official Transcript

Name: Johnna Purcell
Student ID: 916529374

Print Date: 04/19/2023

Johnna Purcell
United States of America

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 05/05/2018
Degree Honors: Magna Cum Laude
Plan: Political Science (BA)
Degree: Bachelor of Arts
Confer Date: 05/05/2018
Degree Honors: Magna Cum Laude
Plan: Global and International Studies (BA)

Beginning of Undergraduate Record

Fall 2014

Program: Liberal Arts
Plan: Liberal Arts (PMAJ) Pre-Major

Course		Description	Attempted	Earned	Grade	Points
ECON	104	Macroec Anly	3.000	3.000	B+	9.990
ENGL	137H	Rcl I	3.000	3.000	A	12.000
Course Attributes:		Honors				
PHIL	1	Basic Prob of Phil	3.000	3.000	A	12.000
PLSC	1H	Intr to Am Nat Gov	3.000	3.000	A	12.000
Course Attributes:		Honors				
SPAN	2	Elem Spanish II	4.000	4.000	A-	14.680

			Attempted	Earned	GPA Units	Points
Term GPA	3.790	Term Totals	16.000	16.000	16.000	60.670
Transfer Term GPA		Transfer Totals	6.000	6.000	0.000	0.000
Combined GPA	3.790	Comb Totals	22.000	22.000	16.000	60.670
Cum GPA	3.790	Cum Totals	16.000	16.000	16.000	60.670
Transfer Cum GPA		Transfer Totals	6.000	6.000	0.000	0.000
Combined Cum GPA	3.790	Comb Totals	22.000	22.000	16.000	60.670

Term Honor: Dean's List

Spring 2015

Program: Liberal Arts
Plan: Liberal Arts (PMAJ) Pre-Major

Course		Description	Attempted	Earned	Grade	Points
BISC	3	Environmental Sci	3.000	3.000	A	12.000
EDTHP	297H	**Special Topics**	3.000	3.000	A	12.000
Course Topic:		Honors Leadership				
Course Attributes:		Honors				
ENGL	138T	Rcl II	3.000	3.000	A	12.000
Course Attributes:		First-Year Seminar				
Course Attributes:		Honors				
PLSC	14U	Intnatl Relations	3.000	3.000	A	12.000
Course Attributes:		Honors				
SPAN	3	Inmd Spanish	4.000	4.000	A-	14.680

			Attempted	Earned	GPA Units	Points
Term GPA	3.920	Term Totals	16.000	16.000	16.000	62.680
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.920	Comb Totals	16.000	16.000	16.000	62.680
Cum GPA	3.850	Cum Totals	32.000	32.000	32.000	123.350
Transfer Cum GPA		Transfer Totals	6.000	6.000	0.000	0.000
Combined Cum GPA	3.850	Comb Totals	38.000	38.000	32.000	123.350

Term Honor: Dean's List

Summer 2015

Program: Liberal Arts
Plan: Liberal Arts (PMAJ) Pre-Major

Course		Description	Attempted	Earned	Grade	Points
MATH	21	College Algebra I	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	3.000	3.000	3.000	12.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	4.000	Comb Totals	3.000	3.000	3.000	12.000
Cum GPA	3.870	Cum Totals	35.000	35.000	35.000	135.350
Transfer Cum GPA		Transfer Totals	6.000	6.000	0.000	0.000
Combined Cum GPA	3.870	Comb Totals	41.000	41.000	35.000	135.350

Robert A. Kubat
Robert A Kubat, University Registrar

Undergraduate Official Transcript

Name: Johnna Purcell
Student ID: 916529374

Fall 2015

Program: Liberal Arts
Plan: Liberal Arts (PMAJ) Pre-Major

Course		Description	Attempted	Earned	Grade	Points
GLIS	101	Globalization	3.000	3.000	A	12.000
PLSC	3	Intro to Comp Pol	3.000	3.000	A-	11.010
PLSC	197H	**Special Topics**	1.000	1.000	B+	3.330
Course Topic:		Special Topics				
Course Attributes:		Honors				
PLSC	309	Quant Pol Analy	3.000	3.000	A	12.000
SPAN	100	Intermed Gram Comp	3.000	3.000	A-	11.010
WMNST	106U	Wmn Gender and Arts	3.000	3.000	A	12.000
Course Attributes:		Honors				

			Attempted	Earned	GPA Units	Points
Term GPA	3.830	Term Totals	16.000	16.000	16.000	61.350
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.830	Comb Totals	16.000	16.000	16.000	61.350
			Attempted	Earned	GPA Units	Points
Cum GPA	3.860	Cum Totals	51.000	51.000	51.000	196.700
Transfer Cum GPA		Transfer Totals	6.000	6.000	0.000	0.000
Combined Cum GPA	3.860	Comb Totals	57.000	57.000	51.000	196.700

Term Honor: Dean's List

Spring 2016

Program: Liberal Arts
Plan: Liberal Arts (PMAJ) Pre-Major

Course		Description	Attempted	Earned	Grade	Points
CMLIT	143	Hr and World Lit	3.000	3.000	A	12.000
PLSC	10	Sci Study of Pols	3.000	3.000	A	12.000
PLSC	405	Amer Pres	3.000	3.000	A	12.000
SPAN	110	Intermed Convs	3.000	3.000	A	12.000
WMNST	100U	Women/Gender St	3.000	3.000	A-	11.010
Course Attributes:		Honors				

			Attempted	Earned	GPA Units	Points
Term GPA	3.930	Term Totals	15.000	15.000	15.000	59.010
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.930	Comb Totals	15.000	15.000	15.000	59.010
			Attempted	Earned	GPA Units	Points
Cum GPA	3.870	Cum Totals	66.000	66.000	66.000	255.710
Transfer Cum GPA		Transfer Totals	6.000	6.000	0.000	0.000
Combined Cum GPA	3.870	Comb Totals	72.000	72.000	66.000	255.710

Term Honor: Dean's List

Fall 2016

Program: Liberal Arts
Plan: Political Science (BA) Major

Course		Description	Attempted	Earned	Grade	Points
EGEE	101	Energy and Envirnmnt	3.000	3.000	A	12.000
ENGL	397	Special Topics	1.500	1.500	A	6.000
Course Topic:		Portfolio Writing				
HIST	465	Civil Rights	3.000	3.000	A	12.000
PLSC	300	Intro Thesis Res	3.000	3.000	A	12.000
Course Attributes:		Honors				
PLSC	428	Gender and Politics	3.000	3.000	A	12.000
WMNST	490	Women Writers	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	16.500	16.500	16.500	66.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	4.000	Comb Totals	16.500	16.500	16.500	66.000
			Attempted	Earned	GPA Units	Points
Cum GPA	3.900	Cum Totals	82.500	82.500	82.500	321.710
Transfer Cum GPA		Transfer Totals	6.000	6.000	0.000	0.000
Combined Cum GPA	3.900	Comb Totals	88.500	88.500	82.500	321.710

Term Honor: Dean's List

Spring 2017

Program: Liberal Arts
Plan: Political Science (BA) Major

Program: Liberal Arts
Plan: Global and International Studies (BA) Major

Course		Description	Attempted	Earned	Grade	Points
ASTRO	1	Astro Universe	3.000	3.000	B	9.000
ENGL	202A	Writing/Soc Sci	3.000	3.000	A-	11.010
GLIS	102	Global Pathways	0.000	0.000	LD	0.000
GLIS	400	Global Studies Sem	3.000	3.000	A	12.000
Req Designation:		Honors				
Course Attributes:		Writing Across the Curriculum				
PLSC	435	Fndtns Amer Pol	3.000	3.000	B+	9.990
Course Attributes:		Writing Across the Curriculum				
WMNST	297	Special Topics	3.000	3.000	A	12.000
Course Topic:		Feminist sex health				

			Attempted	Earned	GPA Units	Points
Term GPA	3.600	Term Totals	15.000	15.000	15.000	54.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.600	Comb Totals	15.000	15.000	15.000	54.000

Robert A. Kubat

Robert A Kubat, University Registrar

Undergraduate Official Transcript

Name: Johnna Purcell
Student ID: 916529374

			Attempted	Earned	GPA Units	Points
Cum GPA	3.850	Cum Totals	97.500	97.500	97.500	375.710
Transfer Cum GPA		Transfer Totals	6.000	6.000	0.000	0.000
Combined Cum GPA	3.850	Comb Totals	103.500	103.500	97.500	375.710

Term Honor: Dean's List

Fall 2017

Program: Liberal Arts
Plan: Political Science (BA) Major

Program: Liberal Arts
Plan: Global and International Studies (BA) Major

Course		Description	Attempted	Earned	Grade	Points
BBH	146	Hlth and Hum Sex	3.000	3.000	A	12.000
COMM	150H	Cinema Art	3.000	3.000	A	12.000
Course Attributes:		Honors				
INART	5	Performing Arts	3.000	3.000	A	12.000
LER	136	Race/Gnder/Emplym t	3.000	3.000	A	12.000
Course Attributes:		Honors				
PLSC	468	Politics and Media	3.000	3.000	A	12.000
WMNST	301	Sex/Gender/Power	3.000	3.000	A	12.000

			Attempted	Earned	GPA Units	Points
Term GPA	4.000	Term Totals	18.000	18.000	18.000	72.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	4.000	Comb Totals	18.000	18.000	18.000	72.000

			Attempted	Earned	GPA Units	Points
Cum GPA	3.880	Cum Totals	115.500	115.500	115.500	447.710
Transfer Cum GPA		Transfer Totals	6.000	6.000	0.000	0.000
Combined Cum GPA	3.880	Comb Totals	121.500	121.500	115.500	447.710

Term Honor: Dean's List

Spring 2018

Program: Liberal Arts
Plan: Political Science (BA) Major

Program: Liberal Arts
Plan: Global and International Studies (BA) Major

Course		Description	Attempted	Earned	Grade	Points
CMLIT	408	Heroic Lit	3.000	3.000	A	12.000
GLIS	102	Global Pathways	3.000	3.000	A-	11.010
HIST	426	Holocaust	3.000	3.000	A	12.000
PLSC	306	Sen Thesis Wrkshop	1.500	1.500	A	6.000
Course Attributes:		Honors				
PLSC	494H	Research Project	3.000	3.000	A	12.000
Course Attributes:		Honors				

			Attempted	Earned	GPA Units	Points
Term GPA	3.930	Term Totals	13.500	13.500	13.500	53.010
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	3.930	Comb Totals	13.500	13.500	13.500	53.010

			Attempted	Earned	GPA Units	Points
Cum GPA	3.880	Cum Totals	129.000	129.000	129.000	500.720
Transfer Cum GPA		Transfer Totals	6.000	6.000	0.000	0.000
Combined Cum GPA	3.880	Comb Totals	135.000	135.000	129.000	500.720

Term Honor: Dean's List

Undergraduate Career Totals

			Attempted	Earned	GPA Units	Points
Cum GPA:	3.880	Cum Totals	129.000	129.000	129.000	500.720
Transfer Cum GPA		Transfer Totals	6.000	6.000	0.000	0.000
Combined Cum GPA	3.880	Comb Totals	135.000	135.000	129.000	500.720

SCHREYER HONORS COLLEGE FA14 -

Non-Course Milestones

Schreyer Honors College
Status: Completed
Program: Liberal Arts
Milestone Title: Schreyer Honors College

Honors in Political Science
Status: Completed
Program: Liberal Arts
Milestone Title: Honors in Political Science

Test Credits

FA 2014

Course		Description	Attempted	Earned	Grade	Points
HIST	20	Amer Civ to 1877	3.000	3.000	TR	0.000
HIST	21	Amer Civ From 1877	3.000	3.000	TR	0.000

Test Trans GPA: 0.000 Transfer Totals: 6.000 6.000 0.000

End of Undergraduate Official Transcript

Robert A. Kubat

Robert A Kubat, University Registrar

PennState

Office of the University Registrar

The Pennsylvania State University
112 Shields Building
University Park, PA 16802
(814) 865-6357
www.registrar.psu.edu

RELEASE OF INFORMATION

In compliance with the Family Education Rights and Privacy Act of 1974, this information is released on the condition that the recipient "will not permit any other party to have access to such information without the written consent of the student."

OFFICIAL DOCUMENT

"Penn State" appears in small print on a blue background across the entire face of the official academic transcript which is printed with security ink. The official transcript bears the seal of Penn State and the signature of the University Registrar. The raised University seal is not required.

OFFICIAL ELECTRONIC DOCUMENT

The official electronic transcript bears the seal of Penn State and the signature of the University Registrar. The blue ribbon security feature appears at the top of the transcript when opened in Adobe Reader.

ACCREDITATION

The Pennsylvania State University, whose prime purpose has always been to serve the people and the interests of the Commonwealth and the Nation, is accredited by the Middle States Association and is a member of the Association of American Universities.

Each of the Penn State Dickinson Schools of Law is on the approved list of the American Bar Association and is a member of the Association of American Law Schools.

INSTITUTIONAL CODE

The institutional code for The Pennsylvania State University is 003329.

TRANSCRIPTS KEYS

To view academic transcript keys for all academic careers, please visit our website at http://www.registrar.psu.edu/transcripts/transcript_key_index.cfm

Cornell Law School

AZIZ F. RANA
Richard and Lois Cole Professor of Law

106 Myron Taylor Hall
Ithaca, New York 14853-4901
T: 607.255.5423
F: 607.255.7193
E: ar643@cornell.edu

April 24, 2023

The Honorable Jamar K. Walker
United States District Court
for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I very enthusiastically recommend Johnna Purcell for a judicial clerkship. She is incredibly intelligent, intellectually curious, and very hardworking. I have no doubt that she would be a wonderful asset to your office.

In the fall of 2018, I was Johnna's professor for Constitutional Law, a four credit lecture course that is required for all first year law students at Cornell. In a class of 65, Johnna was among the very best students in the course and received a grade of A-. Given the grading standards and rigor of the course, this was no small accomplishment. There were only two flat As and if I were not constrained by our curve, Johnna would have received an A as well. I also interacted with her extensively inside and outside of the classroom. In all these interactions, I was struck by her genuine passion for the material and her legal knowledge more generally. She was always meticulously prepared for class. I could count on her to interject her own thoughtful point of view: one grounded in the assigned case or text. In my efforts to facilitate discussion, I was especially appreciative of her role in the course. Johnna was very comfortable in Socratic questioning and had a natural skill in articulating nuanced and complex positions. Given the number of hot button topics we discussed, her ability to avoid polemics and to tease out doctrinal tensions was also quite impressive. Indeed, Johnna's classmates clearly seemed to appreciate her interventions and general calm demeanor, something that is not always the case with the very strongest students.

She brought the same analytical precision and creativity to her written work. If anything, her exam highlighted to me Johnna's talent for legal research and writing. The exam combined doctrinal questions about the Fourteenth Amendment's sex equality jurisprudence with open-ended thematic questions about judicial review, constitutional structure, and rights protection. The argumentation, organizational structure, and writing style were all excellent. Moreover, her responses were imbued with Johnna's own approach to the material – one that combined a clear perspective with subtlety and awareness of competing views.

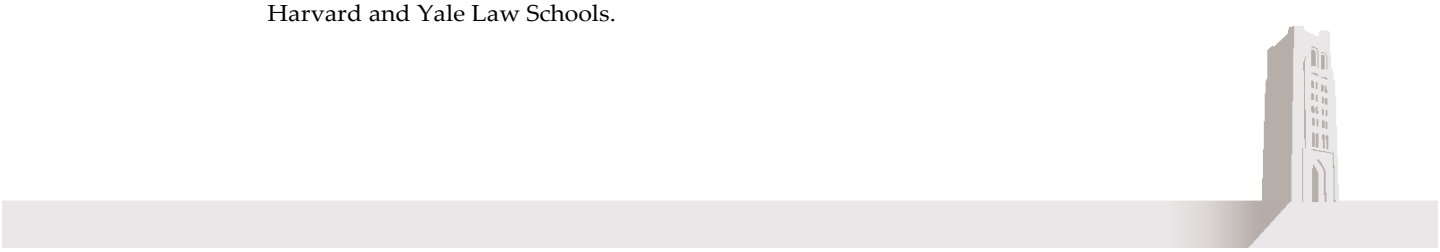
In the spring of 2020, Johnna took another one of my courses, titled "Citizenship in American Constitutional Thought." The class is a three credit seminar that covers issues of immigration, race, and gender in the law of citizenship. It is a rigorous upper-level assessment of these topics with a heavy workload and set of requirements. These include extensive readings in case law, American history, and political philosophy, as well as weekly response papers and a final paper (25-40 pages).

That semester was interrupted by the covid-19 pandemic and our grades, as at most of our peer law schools, were moved to a mandatory pass/fail. But even with all this disruption, Johnna performance remained excellent. Indeed, she was the most outstanding student in the course (out of 16 students). She received the CALI Award and if I were giving grades she would have gotten an A. As with Constitutional Law, I could rely on her to help me shape the conversation. She always read carefully for class and came prepared with comments that pushed our discussion intellectually. And as before, her writing – both in the response papers and in her final paper – was outstanding.

The goal of the final paper was to produce a piece that could be published eventually as legal scholarship. In my view, Johnna's essay was both incredibly original and showed clear publication potential. The paper was a sustained exploration of the law and history of voter registration and election administration in the United States. In the process, she focused on the role going forward of courts and legislatures in solidifying constitutional democracy. Along with being incredibly prescient, what made it a particularly successful piece of scholarship was Johnna's ability to stitch together rich doctrinal analysis with arguments grounded in history and constitutional theory, an impressive achievement in general – all the more so given that she was a second-year law student. I very much hope she considers pursuing publication at some point, and also continues with this line of scholarly research. Her performance in both classes makes evident to me that, if interested, Johnna would be a terrific future legal academic. It also underscores that she has the research and writing skills to be an exceptionally strong judicial clerk.

Outside of class, it was exciting to see Johnna develop as a leader on campus. She excelled in moot court and mock trial and took on leadership roles in various organizations including the Public Interest Law Union and the Moot Court Board. In keeping with her interest in constitutional structure she also wrote a terrific note for the Cornell Journal of Law and Public Policy on judicial reform.

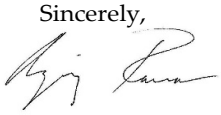
Johnna came to law school with a background in electoral politics. And it was wonderful to see her deepen her knowledge and perspective during her time at Cornell. Similarly, I have been very excited to see her work after graduation at the intersection of law and government, as an Associate Public Policy Attorney at Pillsbury Winthrop Shaw Pitman. Simply put, she is exactly the type of student that makes teaching law especially rewarding. It has been a pleasure to get to know her. She is among the very best students that I have taught in thirteen years as a professor, at Cornell and also as a visiting professor at both Harvard and Yale Law Schools.



All this leads me to believe that a clerkship would be a perfect fit for her. Due to her thoughtfulness, enthusiasm for the law, and evident skill in legal research and writing, I have no doubt that Johnna would be a great addition to your office and again has my very enthusiastic recommendation.

Please feel free to contact me by e-mail at ar643@cornell.edu or by phone at 203-606-9465 if you have any additional questions.

Sincerely,



Aziz Rana
Richard and Lois Cole Professor of Law
Cornell Law School

Cornell Law School

Rachel T. Goldberg
Associate Clinical Professor of Law
Director, Appellate Criminal Defense Clinic
Myron Taylor Hall
Ithaca, New York 14853
P: 607.255-0183 / F: 607.255.7193
E: rtg67@cornell.edu

April 24, 2023

The Honorable Jamar K. Walker
United States District Court
For the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write with enthusiasm to recommend Johnna Purcell for a judicial clerkship in your chambers. In 2018-19 Johnna was a first-year student in my year-long Lawyering course, and I selected her to serve as a teaching assistant for that course in 2019-20. I got to know Johnna well, and I believe that her writing and research skills, professionalism, and work experience will make her an excellent clerk.

I first got to know Johnna as my student in Lawyering, which is Cornell's traditional first-year legal research and writing class; during the fall semester of Lawyering, students write open- and closed-universe predictive memos and perform a simulated oral presentation to a supervisor; during the spring semester, students write and revise a persuasive brief and conduct a simulated pretrial oral argument. Johnna met with me often to discuss her assignments. She seemed genuinely interested in discussing both the mechanics and rhetorical effects of legal-writing choices. Her final paper fall semester—on an issue related to the intersection of art and privacy law—was among the best in the class. During spring semester, in both her written work and in-person meetings, Johnna demonstrated she understood the law, accurately described it, and properly applied it to the facts in question. I was also always happy to see Johnna's hand raised in class, because I could count on her to answer difficult questions correctly, with both sincerity and good humor.

Because Johnna was not only a strong writer and researcher but also a likeable and highly-motivated self-starter, I encouraged her to apply to be a teaching assistant ("Honors Fellow") for Lawyering during her 2L year. Honors Fellows help critique student papers, mentor and support students during one-on-one conferences and office hours, and teach classes on grammar, style, and *Bluebook* issues. Throughout the year, Johnna's critiques of student work were consistently strong, and I trusted her to make accurate and insightful stylistic and substantive suggestions. The year presented another challenge that Johnna met with her typical mix of competence and positivity: our abrupt transition to online learning because of the COVID-19 pandemic. Johnna helped me redesign lesson plans for our new learning environment, anticipated student concerns and anxieties, and helped formulate responses to those concerns.

The work that Johnna performed as an Honors Fellow helps demonstrate that she will have no problem undertaking the large workload of a judicial clerkship. She exhibited both

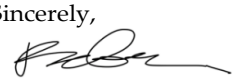
teamwork and leadership skills in effectively cooperating and communicating with me and the other three Honors Fellows, and in mentoring our students.

Johnna's work as an Associate Public Policy Attorney at Pillsbury Winthrop Shaw Pitman LLP has allowed her to hone skills that will make her a highly successful clerk. She regularly drafts legislative language, regulatory compliance attestations and applications, and legal memoranda. Given the small size of her practice group, she receives targeted feedback directly from partners. She also takes on work that more senior associates usually do, such as developing and drafting client proposals and preparing clients for meetings with the federal government. She is directly responsible for managing her time and does not require much oversight to successfully execute a project. Her work and office environment have prepared Johnna to cooperate directly with her co-clerks, work independently on many assignments at once, and maturely communicate with colleagues and litigants.

Finally, I should note that enjoyed working with Johnna. She is a genuinely friendly and nice person who is very easy to approach and collaborate with on work-related projects. She is always excited to embrace a new challenge, no matter how daunting it seems. I believe that Johnna will be a wonderful judicial clerk and I have every confidence that he will successfully manage all of the responsibilities of the position.

If you have any questions about my recommendation, please feel free to email me at rtg67@cornell.edu.

Sincerely,



Rachel T. Goldberg, J.D., Ph.D.
Associate Clinical Professor of Law

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

RICHARD C. WESLEY
UNITED STATES CIRCUIT JUDGE

585-243-7910
FAX 585-243-7915

April 24, 2023

The Honorable Jamar K. Walker
United States District Court
for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: *Johnna Purcell*

Dear Judge Walker:

We are pleased to offer this joint letter of recommendation on behalf of Johnna Purcell, who has applied to your chambers for an elbow clerk position. We jointly teach a class at Cornell Law entitled Federal Appellate Practice. It is a small seminar (12 students) with a very rigorous curriculum. The students argue two cases off the SCOTUS docket, with the final case being argued before an Article III panel of district and circuit judges. In addition, they write a limited issue memo—usually a bail issue—and a full-length merits brief. This is a class of highly motivated students; over the ten years that we have taught this class close to 75% of the students have secured judicial clerkships. Professor Blume has the added perspective of having taught Johnna Criminal Procedure Adjudications, which we will discuss later in the letter.

First, the bottom line: Johnna has all the skills to be a terrific clerk. She writes well—her brief was one of the best in class. She is an exceptionally self-motivated young lawyer. Johnna has managed a campaign for a seat in Congress, authored a note that was published in one of Cornell's journals, been an active participant in student life at Penn State and Cornell, and excelled academically at both institutions.

There is one aspect of Johnna's resume that says a great deal about her and what she would bring to your chambers. During her 2L year, Johnna served as an Honors Fellow for the First Year Legal Writing Seminar. Honors Fellows are selected by their 1L instructors in the Writing Seminar to act as TAs for the following year. They are selected based on their academic performance, their maturity, and most importantly, their ability to work collaboratively with 1Ls coming to grips with "thinking and writing like a lawyer." In our experience as a Judge (now 35 years) and Professor of Law (now 26 years) we have found that Honors Fellows have been excellent clerks. Judges that regularly hire Cornell students look for the Honors Fellow entry on a candidate's resume. We

LIVINGSTON COUNTY GOVERNMENT CENTER
6 COURT STREET
GENESEO, NEW YORK 14454-1030

know based on Johnna's performance in class and how she has conducted herself at Cornell that she would be a joy to have in chambers.

At the time Johnna took our class, the nation was in the throes of the COVID nightmare. All of Johnna's classes were conducted remotely, as were her two arguments. This added stress did not deter Johnna. In her final argument, she did an excellent job before the panel, despite a rash of "technical" difficulties during the final round. She also demonstrated an ability to work well collaboratively, as she had a co-counsel for her arguments and the brief writing assignment.

In Criminal Procedure Adjudications (taken the same semester), Johnna was an excellent student. She was always "in" class (it was hybrid, with students alternating between Zoom and in-person), took part frequently (but not obnoxiously), and when she did her comments, they were always well-thought-out and on point. Additionally, Johnna did a very competent job on the final examination. She earned an "A-" in the class and just barely missed the cutoff for an "A".

Because of her excellent legal research and writing skills, rigorous intellect, and her ability to work well with others, we both enthusiastically endorse Johnna's application and would be more than happy to discuss her candidacy and qualifications with you further should you desire.

Very truly yours,

Richard C. Wesley
Senior Judge, U.S. Court of Appeals for the Second Circuit

John H. Blume
Samuel F. Leibowitz Professor of Trial Techniques

LIVINGSTON COUNTY GOVERNMENT CENTER
6 COURT STREET
GENESEO, NEW YORK 14454-1030

Johnna Purcell

910 M Street NW
Washington, DC 20001
Jfp93@cornell.edu
724-812-6257

Writing Sample

The following writing sample is an excerpt from my final paper for my Federal Appellate Practice class. The assignment was to write a Supreme Court merits brief for the petitioner in the case of *Wardlow v. Texas*, 2020 WL 2059742 (Tex. Crim. App. 2020), cert. denied, 141 S. Ct. 190 (2020). The assignment asked us to assume that the petition for writ of certiorari had been granted and that the question before the Court was whether Texas's statutory requirement that a jury determine a capital defendant's future dangerousness is constitutional under the Eight and Fourteenth amendments in the case of defendants who were under 21 years old when they committed their crime.

This brief was originally over 50 pages in length. For the purpose of this writing sample, I have only included the question presented and a portion of the argument section considering the constitutionality of Texas's factor in light of the Supreme Court's jurisprudence. I have eliminated the statement of the case, statement of facts, and additional discussion of the scientific evidence regarding determinations of future dangerousness in juveniles. I have also modified the margins and page size from Supreme Court filing standards for ease of review.

QUESTION PRESENTED

Whether, under the Eighth and Fourteenth Amendments, Texas may continue to impose, and carry out previously imposed, death sentences for which future dangerousness is or was used to determine death eligibility for defendants who were under 21 years old at the time of the crime?

ARGUMENT

I. The Eighth Amendment Forecloses the Consideration of Future Dangerousness for Capital Defendants Who Committed Their Crimes Before the Age of 21.

"[T]he penalty of death is qualitatively different from a sentence of imprisonment." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). "It is unique in its total irrevocability . . . rejection of rehabilitation of the convict as a basic purpose of criminal justice . . . [a]nd absolute renunciation of all that is embodied in our concept of humanity." *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring). Because a capital sentence is "the most severe punishment" in the American criminal justice system, "the Eighth Amendment applies to it with special force." *Roper v. Simmons*, 543 U.S. 551, 568 (2005). As such, there is "a corresponding difference in the need for reliability in the determination that death is the appropriate punishment." *Woodson*, 428 U.S. at 305. The Eighth Amendment does not tolerate unreliable or arbitrary determinations to support a capital sentence. *See Johnson v. Mississippi*, 486 U.S. 578, 584 (1988). The decision to impose death "cannot be predicated on mere 'caprice' or on 'factors that are constitutionally impermissible or totally irrelevant to the sentencing process.'" *Id.* at 585 (quoting *Zant v. Stephens*, 462 U.S. 862, 885 (1983)). To meet the Eighth Amendment's heightened standard, a death penalty framework must accord "significance to relevant facets of the character and record of the individual offender" or risk treating defendants "not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Id.* at 304.

a. The Eighth Amendment's Reliability Requirement Cannot Be Met When Determining the Future Dangerousness of Defendant's Who Were Under 21 at the Time of Their Crimes.

The Eighth Amendment requires heightened reliability when imposing a death sentence. *See*, *e.g.*, *Johnson*, 486 U.S. at 584. For a death sentence to be constitutional, it must follow from a careful consideration of the defendant's character. *See Roper* 543 U.S. at 569 (2005). A sentencer must be sure not only that the defendant committed the crime but also that the individual is sufficiently culpable to deserve a death sentence. *See Roper* 543 U.S. at 571; *Atkins v. Virginia*, 536 U.S. 304, 306 (2002); *Thompson v. Oklahoma*, 487 U.S. 815, 823 (1988). This

standard requires a sentencer to evaluate the individual defendant's background and character. *See Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *see also California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("Thus, the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime. . . .").

Additionally, this Court has long recognized that determinations regarding which sentencing procedures satisfy the Eight Amendment are not static. *Furman v. Georgia*, 408 U.S. 238, 328 (1972) (Marshall, J. concurring) ("[T]he cruel and unusual punishment clause [is] not a static concept, but one that must be constantly re-examined 'in the light of contemporary human knowledge.'" (quoting *Robinson v. California*, 370 U.S. 660, 666 (1962))). The Eighth Amendment requires that courts reevaluate when a punishment no longer comports with "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958). When evaluating changing standards, a court must use "objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

To the contrary, scientific understanding has directly affected Eighth Amendment jurisprudence. *See Roper* 543 U.S. at 569–70; *Atkins*, 536 U.S. at 316 n. 21 (noting scientific consensus on opposition to the death penalty for those with mental disabilities). This is particularly true for juvenile offenders. This Court has used scientific evidence to support their conclusions in several cases. *See, e.g.*, *Miller*, 567 U.S. 460, 471–72 (holding juveniles cannot be sentenced to mandatory life without the possibility of parole); *Graham*, 560 U.S. at 68 (holding juveniles cannot be sentenced to life without the possibility of parole for non-homicide offenses); *Roper*, 543 U.S. at 569 (holding individuals cannot be executed for crimes they committed before they were 18 years old). Science has evolved since this Court heard these cases. Researchers now know that emerging adults' brains, from ages 18 to 20, are not fully mature. Therefore, emerging adults lack the ability to "regulate functions like judgment and self-control."[1] As such, the Texas capital sentencing statute's requirement of future dangerousness is inaccurate and does not withstand constitutional scrutiny.

i. A Fully Formed Character, Which Does Not Occur Prior to the Age of 21, Is Necessary to Determine Future Dangerousness.

To accurately determine if an individual is likely to be dangerous in the future, a sentencer must analyze that individuals' character. In the case of younger defendants, this determination can range from difficult to impossible. This Court has

[1] B.J. Casey, Richard J. Bonnie, Andre Davis, David L. Faigman & Morris B Hoffman, *How Should Justice Policy Treat Young Offenders?: A Knowledge Brief of the MacArthur Foundation Research Network on Law and Neuroscience* at 3 (2017) [hereinafter *How Should Justice Policy Treat Young Offenders?*].

recognized that an individual's age informs their criminal culpability. *See Thompson*, 487 U.S. at 834. The Court placed determinative emphasis on age when it "[f]orbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper*, 543 U.S. at 578.

In its holding, the Court recommitted itself to the principle that "[c]apital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Id.* at 568 (citing *Atkins v. Virginia*, 536 U.S. 304, 319 (2002)). Then, the Court identified "[t]hree general differences between juveniles under 18 and adults" that merited disparate treatment. *Id.* at 569. Those differences are: (1) "[a] lack of maturity and an underdeveloped sense of responsibility,'" (2) "vulnerab[ility] or susceptib[ility] to negative influences and outside pressures, including peer pressure," and (3) "character . . . that is not as well formed as that of an adult." *Id.* at 569–70. Differences between juvenile and adult offenders make it more likely that a sentencer will inaccurately find an individual to have requisite culpability to be sentenced to death. *See id*. at 572.

In *Roper*, this Court recognized that it is difficult to accurately assess juveniles' characters because they are still developing. *Id.* at 569–70. Asking a jury to determine future dangerousness is a similar inquiry. It asks a sentencer to determine if an individual has a character that makes them more likely to be violent. As the *Roper* Court recognized, "it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character." *Id.* at 570. Therefore, the determination of future dangerousness cannot be accurate for juveniles. After all, "it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Id.* No expert, judge, nor jury can make an accurate determination about the future dangerousness of an individual whose character is not yet fully developed.

ii. Outside the Death Penalty Context, This Court Has Recognized Juveniles Do Not Have Fully Formed Characters.

Five years after *Roper*, this Court spoke again about a juvenile's culpability. This Court held that youthful offenders who did not commit homicide were not sufficiently culpable to be eligible for a life sentence without the possibility of parole. *Graham* 560 U.S. at 76. Essential to its holding was the expansion of *Roper*.

In *Graham*, this Court recognized that "developments in psychology and brain science continue[d] to show fundamental differences between juvenile and adult minds." *Id.* at 68. The Court observed that "parts of the brain involved in behavior control continue to mature through late adolescence." *Id.* Therefore, this Court

embraced the idea there are inherent differences between the character of juveniles and adults.

Critically, the very scientific support the Court relied on in coming to this conclusion did not exclusively speak to the character development of juveniles. In fact, the studies the Court cited observed that 20-year-olds had similarly developed characters to individuals under 18. *Id.; see* Brief for American Medical Association et al. as Amicus Curiae, 18 n.51, *Graham v. Florida*, 560 U.S. 48 (2010); *see also* Brief for American Psychological Association et al. as Amicus Curiae, 27, *Graham v. Florida*, 560 U.S. 48 (2010) ("This shift in the brain's composition continues throughout adolescence; indeed, studies indicate that [frontal lobe development] continues into young adulthood."). In setting the line at 18 years old, the Court chose to draw the line at the age of majority. *Roper*, 543 U.S. at 1197. However, even then the Court acknowledged that this was an arbitrary exercise. *See id*. at 1197–98 ("For the reasons we have discussed, however, a line must be drawn.")

After *Roper*, this Court continued to embrace the principle that "children are constitutionally different from adults for purposes of sentencing." *Miller*, 567 U.S. at 471. In holding that the Eighth Amendment prohibits sentences of life without the possibility of parole for offenders who were under 18 at the time they committed a nonhomicide crime, the Court recognized several specific characteristics of youthful offenders. The Court noted that juveniles have difficulty "weighing long-term consequences" exhibit "a corresponding impulsiveness" and are "reluctan[t] to trust defense counsel." *Graham* 560 U.S. at 71–72, 78. The Court expanded the scope of its holding just two years later to the imposition of mandatory life without the possibility for parole for juvenile offenders—regardless of the underlying crime. *Miller*, 567 U.S. at 480. Again, the Court recognized that the "transient rashness, proclivity for risk, and inability to assess consequences" of young people lessens their moral culpability. *Id.* at 472. Thus, a trial court must consider a juvenile's unique characteristics—which often disappear with age—prior to sentencing them to life without parole. *Id.* at 477–78. While part of the rationale for utilizing these three distinctions came from common-sense personal observations, the Court relied primarily upon the growing base of psychological research. *Id.* at 471 ("Our decisions rested not only on common sense—on what 'any parent knows'—but on science and social science as well."); *Roper*, 543 U.S. at 569.

b. Scientific Advancements Show That No One Can Accurately Determine Future Dangerousness Before the Age of 21 Because the Brain Is Not Sufficiently Developed.

Society's standards of decency have not remained stagnant since the Court last spoke on the Eight Amendment's sentencing restrictions on juvenile offenders.[2] When

[2] Even the Texas Legislature has identified the problematic state of its death penalty statute, but it will not take up the issue until 2021. Jolie McCollough, *Texas executes Billy Wardlow, who was 18*

evaluating society's standards of decency, courts should aim to use "objective factors to the maximum possible extent." *Coker v. Georgia*, 433 U.S. 584, 592 (1977). While legislative enactments are the quintessential objective indicia, scientific advancements are another relevant form of evidence. *See Roper*, 543 U.S. at 568–69.

Over the last decade, scientists have created more precise tools for taking magnetic images of the brain, invented a new form of Magnetic Resonance Imaging (MRI) to study the brain's wiring, and developed novel approaches to understand the brain's functional network. Brief for Professional Organizations, Practitioners, and Academics in the Field of Neuroscience, Neuropsychology, and Other Related Fields as Amicus Curiae at 9 [hereinafter Brief for Professional Organizations]. These advances have produced evidence showing what the Court has assumed to be true—adolescent behaviors do not stop at the age of 18. *Roper*, 543 U.S. at 574 ("Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.") Reinforcing the Court's beliefs, research in neuroscience and brain development has made clear that the brain is not "recognizably *adult* until after the age of 20." Brief for Professional Organizations at 8 (emphasis in original).

Moreover, even since *Miller* our understanding of human development and psychology has also improved dramatically. Leading diagnostic manuals now recognize that antisocial behavior from children and adolescents often occurs in isolated incidents and is not evidence of a mental disorder.[3] Numerous peer reviewed studies support the conclusion "that more than 90% of all juvenile offenders desist from crime by their mid-20s."[4] "Predictions of future violence in the case of an 18-year-old are inherently unreliable" because they are "overwhelmingly likely to grow out of it." Brief for Professional Organizations at 9.

c. Billy Is Living Proof These Scientific Advancements Are Accurate and the Jury's Determination of His Future Dangerousness Was Not.

By the age of 20, Billy was a high-school dropout and had been convicted of capital murder. Billy knew that he would be incarcerated for the rest of his life. Under circumstances where many would become violent or angry, Billy did not. Instead, he

---

when he killed a man. Experts argued that's too young for a death sentence, Tex. Trib. (July 8, 2020), https://www.texastribune.org/2020/07/08/texas-execution-billy-wardlow/.

[3] AMERICAN PSYCHIATRIC ASSOCIATION, *Diagnostic and Statistical Manual of Mental Disorders* 726 (5th ed. 2013) ("Child or Adolescent Antisocial Behavior[:] This category can be used when the focus of clinical attention is antisocial behavior in a child or adolescent that is not due to a mental disorder (e.g., intermittent explosive disorder, conduct disorder). Examples include isolated antisocial acts by children or adolescents (not a pattern of antisocial behavior)").

[4] Laurence Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions about Adolescents' Criminal Culpability*, 14 Neuroscience 513, 516 (2013).

matured. Since turning 21, Billy has not engaged in violence. No one that knows him today sees him as threatening or dangerous. His character is not "irretrievably depraved," *Roper*, 543 U.S. at 570, or "incorrigible," *Graham*, 560 U.S. at 72.

Indeed, Billy is known for his kindness. He has a reputation as someone who does not "bully, steal, or manipulate." Exhibit 6 to the Subsequent Application for Writ of Habeas Corpus, at 7 (declaration of Tony Ford). Billy has avoided the typical dilemmas of prison life. For instance, Billy is not, nor has he ever been, a member of a prison gang. *Id.* He is known for working to quell racial tensions by speaking out against racism. *Id.* at 15. He has helped fellow inmates learn math, science, and coding. Exhibit 7 to the Subsequent Application for Writ of Habeas Corpus, at 1–2 (declaration of Mark Robertson).

"From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." *Roper*, 543 U.S. at 570. Nevertheless, a jury's finding permanently ascribes to Billy a character which he no longer has. Indeed, Billy's character has fundamentally changed since the day he committed his crime. His risky and impulsive behaviors have "cease[d] with maturity." *Roper*, 543 U.S. at 570 (citing Laurence Steinberg & Elizabeth Scott, *Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty*, 58 Am. Psychologist 1009, 1014 (2003)).

Billy is an example of the reality that a determination of future dangerousness can be inaccurate for emerging adults, but he is not the only case. Nearly all emerging adults who engage in violent conduct during their youth will stop doing so as they mature.[5] Moreover, as was Billy's case, between 25 and 50 precent of young offenders will never commit another crime. Brief for Professional Organizations at 18 (citing Megan Kurlycheck, Shawn Bushway & Robert Brame, *Long-Term Crime Desistance and Recidivism Patterns—Evidence from the Essex County Felony Study*, 50 Criminology 71 (2012)).

The jury was wrong about Billy. But the decision before this court is not aimed at retroactively overturning a jury's verdict based on an incorrect factual finding. Rather, it concerns the question that the Texas death penalty statue asks the jury to answer itself. The constitutional error was not that the jury who sentenced Billy to death came to the wrong conclusion, but that the Texas death penalty statue does not properly empower a sentencer to come to the correct one. As the amici put it, "predictions of future violence in the case of an 18-year-old are inherently unreliable and will lead to many more false positives than accurate predictions." Brief for Professional Organizations at 17. The scientific research is now clear that a jury can

[5] Laurence Steinberg, Elizabeth Cauffman & Kathryn Monahan, *Psychological Maturity and Desistance from Crime in a Sample of Serious Juvenile Offenders*, DOJ Juvenile Justice Bulletin (Mar. 2015).

never reliably determine the future dangerousness of an 18 to 20-year-old. Billy is living proof of that. *Id.* Thus, the Texas capital punishment sentencing scheme which only considers future dangerousness as an aggravating factor at cannot pass constitutional muster.

d. This Court's Holdings in *Jurek v. Texas* and *Barefoot v. Estelle* Do Not Foreclose Limiting the Consideration of Future Dangerousness to Those Who Were 21 or Older at the Time of Their Crimes.

Under the Texas Capital Sentencing Procedure, the jury must make answer two questions at the penalty phase. These questions ask the jury to make determinations on two special issues. Special Issue 1, asks the jury to determine whether "the Defendant will more likely than not, commit criminal acts of violence in the future so as to constitute a continuing threat to society." *See* Tex. Crim. Proc. Art. 37.071 § 2. This question asks the jury to determine the future dangerousness of the individual. Special Issue 2 asks if "there is a sufficient mitigating circumstance or circumstances to warrant a sentence of life imprisonment rather than a death sentence." *Id.* If the jury answers Special Issue 1 in the negative, the court must sentence the defendant to life imprisonment without parole. *Id.* at § 2(g). Consequently, the State's case for imposing the death penalty relies on a jury's determination of future dangerousness.

This Court has twice considered the constitutionality of Special Issue 1. The first time the Court considered the question was in *Jurek v. Texas*, 428 U.S. 262, 274 (1976). Jerry Lane Jurek, who was 22 years old at the time of his crimes, challenged the constitutionality of the Texas capital sentencing procedure under the Eight and Fourteenth Amendments. *Id.* at 266, 274. In part, the petitioner argued that the statue was unconstitutional because it was "impossible to predict" future dangerousness as required by Special Issue 1. The Court rejected those arguments. *Id.* at 275–76. In doing so, it noted that "prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system." *Id.* at 275. As a result, it was constitutional to ask a jury to make findings that judges frequently make in other contexts such as bail and parole. *Id.* The Court noted, however, that it is "difficult" to make a determination of future dangerousness. *Id*. at 274. As such, the Court demanded juries have accesses to "all possible relevant information about the individual defendant whose fate it must determine." *Id*. at 276.

After upholding the constitutionality of the Texas Capital Sentencing Statute, this Court was asked to determine what sort of evidence could prove future dangerousness. Specifically, in *Barefoot v. Estelle*, 463 U.S. 880, 896–97 (1983), this Court was asked to determine if the expert testimony of psychiatrists may speak to the determination of future dangerousness for the purpose of Special Issue 1. The Court held that experts were permitted to testify on the future dangerousness of a defendant at the punishment phase of a capital trial. *Id.* at 901. Citing *Jurek*, Justice

Stevens, writing for the majority, reasoned that if it was possible "for even a lay person sensibly to arrive at" the conclusion of future dangerousness that a psychiatrist is able to form an expert opinion on the issue. *Id.* at 896. Echoing *Jurek*, the Court recognized that the "adversar[ial] process" must "sort out the reliable from the unreliable evidence and opinion about future dangerousness." *Id.* at 901.

But the Court did not go as far as to suggest that the mere adversarial nature of the process was sufficient to achieve the heightened reliability required by the Eighth Amendment. Rather, it found that because psychologists incorrectly predicted future dangerousness "most of the time" and not always, the testimony was, "at least as of now" constitutionally permissible. *Id.* Notably, at the time he committed his crimes, Thomas A. Barefoot was 38 years old.[6] *See Barefoot v. Estelle*, 697 F.2d 539, 594 (5th Cir. 1983). Consequently, the concerns which the American Psychiatric Association and the petitioner identified in *Barefoot* were more generalized grievances concerning the shortcomings of experts' ability to predict future dangerousness. *See Barefoot*, 463 U.S. at 901. They were not tailored to the specific challenges presented in assessing juveniles.

Billy's case fits squarely in the space left open in *Barefoot*. In *Barefoot*, the Court noted that the expert testimony on future dangerousness was permitted because, in 1983, the court believed that it was occasionally accurate. However, that can no longer be the case. Since the Court decided *Barefoot* in 1983, neuroscientists have determined that one cannot reliably predict future dangerousness for individuals under the age of 21. In the situations where the determination is correct, it is only by chance. In the case of emerging adults, neuroscientists believe that there is no possible way for an expert to form an accurate expert opinion on future dangerousness. Brief for Professional Organizations at 10 ("No known technology or methodology would allow an expert to differentiate between an emerging adult whose antisocial behavior is due to neurological immaturity and an emerging adult who is likely to be dangerous in the future."). The determination is not accurate sometimes—it is nothing more than a guess. Therefore, even by the terms that *Jurek* and *Barefoot* set out, the consideration of future dangerousness for emerging adults is constitutionally suspect because psychiatrists can never make a sound prediction.

This Court need not abrogate neither the holding in *Jurek* nor *Barefoot* to rule in Billy's favor. The holdings in *Jurek* and *Barefoot* stand for the principle that the consideration of the question and evidence of future dangerousness may be constitutionally permissible. *See Barefoot*, 463 U.S. at 901 ("We are unconvinced, however, at least as of now, that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness."); *Jurek*, 428 U.S. at 276. Even after a ruling for Billy that would still be true. The effect of a ruling for Billy Wardlow would not upset *Jurek* and *Barefoot*. It would carve out

[6] *Two Put to Death After Pleas Fail*, N.Y. Times (Oct. 30, 1984) https://www.nytimes.com/1984/10/30/us/two-put-to-death-after-pleas-fail.html.

a particular category of individuals who are not subject to the future dangerousness analysis.

II. Consideration of Age Merely as a Mitigating Factor Is Insufficient to Comply with the Eighth Amendment's Mandate.

Jurek makes clear that "the age of the defendant" is one facet of "relevant information" a jury must be permitted to hear. 428 U.S. at 273. It is not enough, however, for the jury to simply consider a defendant's age as a mitigating factor in the Texas capital sentencing scheme.

When this Court examined Texas's capital sentencing statute in *Jurek*, there was no special issue which explicitly compelled the jury to consider mitigating evidence. *See* 428 U.S. at 265 n.1. The Texas Court of Criminal Appeals, however, interpreted the question of future dangerousness as allowing consideration of mitigating evidence. *Jurek v. Texas*, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975). In its current form, Tex. Crim. Proc. Art. 37.071 § 2 seeks to displace consideration of age for the question of future dangerousness by creating a different category under which the jury could consider age as a mitigating factor.[7]

Cabining consideration of age solely to a mitigation category is insufficient for two reasons. First, it does not reach the heart of the issue in cases such as Billy's. In these cases, the problem is not that the defendant's age mitigates the fact that they are likely to be dangerous in the future. Instead, the problem is that it is impossible to tell that a person will be dangerous in the future because of their age. *See* discussion *supra,* Section I.A. Age is not just a mitigating factor that reduces culpability, it is an obstacle that inhibits the inquiry into future dangerousness for individuals aged 18 to 21. Considering age as a mitigating factor does not make the determination of future dangerousness more accurate. Therefore, doing so does not make the determination of Special Issue 1 meet the Eighth Amendment's heightened reliability requirement.

Second, this Court has cautioned against this approach. Nothing in *Roper*'s rationale precludes the Court from reassessing the placement of the line in light of new neuroscientific research and treatment of emerging adults. To the contrary, in *Roper*, the Court recognized that the "linchpin" of the petitioner's argument against a categorical bar of executing children was that a jury would be able to consider age as a mitigating factor. 543 U.S. at 572. Rejecting this argument, the Court explained that "[a]n unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity,

[7] Texas altered its procedure because the Court held that the prior form of the statute was constitutionally inadequate under the Eighth and Fourteenth Amendments because it "did not provide a vehicle for the jury to give mitigating effect" to certain types of evidence. *Penry*, 493. U.S. at 324.

vulnerability, and lack of true depravity should require a sentence less severe than death." *Id.* at 572–73. In fact, the problem of considering youth only in mitigation goes beyond mere cold-bloodedness. This approach runs the risk of rogue actors improperly treating youth as an aggravating circumstance instead of a mitigating one. That is precisely the strategy that the prosecutor took in *Roper*. *See* 543 U.S. at 573. In so recognizing, the Court held that sentencers could not adequately consider the relevant qualities of juveniles under a mitigation framework.

Nevertheless, that is precisely what Texas seeks to do. Classifying age solely as a mitigating factor obfuscates its proper role in the consideration of other special issues. The Eighth and Fourteenth Amendments do not allow a state to cure an inherently inaccurate procedure by considering age merely as a mitigating factor. Instead, age needs to be considered at the outset to determine if the determination of future dangerousness can ever accurately be made.

CONCLUSION

For the foregoing reasons, Billy Wardlow respectfully requests that this Court reverse the decision of the Texas Court of Criminal Appeals and grant his request for post-conviction relief.

Applicant Details

First Name	**Kira**
Last Name	**Pyne**
Citizenship Status	**U. S. Citizen**
Email Address	**kirapyne@law.gwu.edu**
Address	**Address** Street **1234 Massachusetts Ave NW #702** City **Washington** State/Territory **District of Columbia** Zip **20005**
Contact Phone Number	**5089444594**

Applicant Education

BA/BS From	**American University**
Date of BA/BS	**May 2020**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 18, 2024**
Class Rank	**10%**
Law Review/Journal	**Yes**
Journal(s)	**The George Washington Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Bousquet, Daniel
dbousquet@law.gwu.edu
Canan, Russell
russellcanan@gmail.com
(202) 879-1952
Goel, Aditi
aditi.goel@6ac.org

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Kira Pyne
1234 Massachusetts Ave. NW
Washington, DC 20005

May 28, 2023

The Honorable Jamar K. Walker
United States District Court for the
Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker,

I am a rising 3L at the George Washington University Law School and a Notes Editor on the *George Washington Law Review*. I am writing to apply for a 2024-2025 clerkship in your chambers.

Attached for your review are my resume, transcript, writing sample, and letters of recommendation from the Honorable Russell Canan, Professor Daniel Bousquet, and Aditi Goel of the Sixth Amendment Center. The writing sample is an excerpt from a judicial opinion I wrote as a final paper for my Judicial Lawyering class.

Thank you for your consideration, and please feel free to contact me at (508) 944-4594 or kirapyne@law.gwu.edu if I can provide you with any further information.

Respectfully,

Kira Pyne

KIRA PYNE

1234 Massachusetts Ave NW #702 Washington, DC 20005
(508) 944-4594 □ kirapyne@law.gwu.edu

EDUCATION

The George Washington University Law School, Washington, DC
3.74 GPA, J.D. expected May 2024
Honors: George Washington Scholar (Top 1-15% of class)
Activities: The George Washington Law Review (Vol. 92 Notes Editor), Academic Tutor
Note: "*Fare* is Unfair: A new totality of circumstances analysis for juvenile waivers of counsel"

American University School of Public Affairs, Washington, DC
B.A., *magna cum laude,* Interdisciplinary Studies, May 2020
Activities: Rude Mechanicals Theatre Troupe (Executive Director), Phi Alpha Delta Pre-Law Fraternity
Thesis: "Analysis of Bullying Policies and Chronic Absenteeism in DC Public High Schools"

EXPERIENCE

Blank Rome, Washington, DC
Summer Associate, May 2023-Present

Family Justice and Litigation Clinic, Washington, DC
Student Attorney, January 2023-Present
- Represents clients in divorce, child custody, and protection order matters
- Represented petitioner in a CPO trial and successfully obtained a one-year CPO
- Performs direct examinations, cross examinations, and oral arguments in family court
- Assists family court plaintiffs in properly serving defendants

United States District Court, Washington, DC
Judicial Intern to the Honorable Paul L. Friedman, September-November 2022
- Drafted portions of an opinion regarding admission of evidence in a second-degree murder trial
- Researched and drafted an opinion on jurisdictional discovery in an ongoing terrorism case
- Answered questions and assisted potential jurors during voir dire.

Sixth Amendment Center
Summer Intern, May-August 2022
- Tracked state updates about indigent defense via news articles, legislation, and court cases
- Researched and wrote summaries about states and the operation of their public defense systems
- Collaborated on researching Texas court systems in preparation for a statewide indigent defense evaluation

Justice Innovation Lab at the George Washington University Law School, Washington, DC
Research Assistant, May-August 2022
- Interpreted Excel data of criminal charges and determines how they are related
- Wrote memos summarizing major findings of data
- Conducted interviews with prosecutors and defense attorneys regarding escalating sanctions in their state

CityYear, Providence, RI
Americorps Member, August 2020-June 2021
- Provided teacher support and individual tutoring for a fourth-grade class, both in-person and virtually
- Tracked student attendance and worked with families to create attendance plans

Coalition for Juvenile Justice, Washington, DC
Communication and Administrative Assistant, May 2019-July 2020
- Tracked state procedures regarding COVID-19 in youth facilities and wrote a document of best practices that was sent to juvenile justice leaders throughout the United States
- Worked with board member to plan and run monthly meetings with Midwestern Regional members of CJJ

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G41254225
Date of Birth: 02-JUL

Date Issued: 05-JUN-2023

Record of: Kira Reynolds Pyne

Page: 1

Student Level: Law
Admit Term: Fall 2021

Issued To: KIRA PYNE
KIRAPYNE@GWU.EDU

REFNUM:5593609

Current College(s):Law School
Current Major(s): Law

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
	Law School		
	Law		
LAW 6202	Contracts Swaine	4.00	A
LAW 6206	Torts Turley	4.00	A-
LAW 6212	Civil Procedure Berman	4.00	A-
LAW 6216	Fundamentals Of Lawyering I Kettler	3.00	B+
Ehrs 15.00	GPA-Hrs 15.00	GPA 3.689	
CUM 15.00	GPA-Hrs 15.00	GPA 3.689	
THURGOOD MARSHALL SCHOLAR			
TOP 16%-35% OF THE CLASS TO DATE			
Spring 2022			
	Law School		
	Law		
LAW 6208	Property Kieff	4.00	A
LAW 6209	Legislation And Regulation Schwartz	3.00	A-
LAW 6210	Criminal Law Weisburd	3.00	A
LAW 6214	Constitutional Law I Cheh	3.00	A-
LAW 6217	Fundamentals Of Lawyering II Kettler	3.00	B+
Ehrs 16.00	GPA-Hrs 16.00	GPA 3.750	
CUM 31.00	GPA-Hrs 31.00	GPA 3.720	
Good Standing			
DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2022			
	Law School		
	Law		
LAW 6230	Evidence Durrer	3.00	A-
LAW 6380	Constitutional Law II Fontana	3.00	B
LAW 6668	Field Placement Mccoy	3.00	CR
LAW 6669	Judicial Lawyering Canan	2.00	A-
LAW 6888	Crisis & Legal Controversy Cia Petrila	2.00	B+
Ehrs 13.00	GPA-Hrs 10.00	GPA 3.400	
CUM 44.00	GPA-Hrs 41.00	GPA 3.642	
Good Standing			
THURGOOD MARSHALL SCHOLAR			
TOP 16%-35% OF THE CLASS TO DATE			
Spring 2023			
LAW 6360	Criminal Procedure	4.00	A
LAW 6400	Administrative Law	3.00	A+
LAW 6624	Family Justice Litig. Clinic	6.00	A
Ehrs 13.00	GPA-Hrs 13.00	GPA 4.077	
CUM 57.00	GPA-Hrs 54.00	GPA 3.747	
Good Standing			
GEORGE WASHINGTON SCHOLAR			
TOP 1% - 15% OF THE CLASS TO DATE			
Fall 2022			
	Law School		
	Law		
LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	
Spring 2023			
LAW 6657	Law Review Note	1.00	----------
	Credits In Progress:	1.00	
Fall 2023			
LAW 6218	Prof Responsibility & Ethics	2.00	----------
LAW 6232	Federal Courts	3.00	----------
LAW 6624	Family Justice Litig. Clinic	6.00	----------
LAW 6640	Trial Advocacy	3.00	----------
LAW 6658	Law Review	1.00	----------
	Credits In Progress:	15.00	

********** CONTINUED ON PAGE 2 **********

Katie Cloud
Interim University Registrar

This transcript processed and delivered by Parchment

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G41254225
Date of Birth: 02-JUL

Date Issued: 05-JUN-2023

Record of: Kira Reynolds Pyne

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	57.00	54.00	202.33	3.747
OVERALL	57.00	54.00	202.33	3.747

########## END OF DOCUMENT ##########

Katie Cloud
Interim University Registrar

This transcript processed and delivered by Parchment

Office of the Registrar
THE GEORGE WASHINGTON UNIVERSITY
Washington, DC 20052

NOTICE TO RECIPIENT

Federal legislation (the Family Educational Rights and Privacy Act) requires institutions of higher education to inform each recipient of this academic record that it is to be used only for the purpose for which it was presented and that it is not to be copied or made available to a third party without the express permission of the individual concerned. It must be pointed out in this context that as a general practice, mutually agreed upon by professional associations, such records are not to be reproduced for distribution beyond the purview of the recipient or his/her organization.

DESIGNATION OF CREDIT

All courses are taught in semester hours.

TRANSFER CREDIT

Transfer courses listed on your transcript are bonafide courses and are assigned as advanced standing. However, whether or not these courses fulfill degree requirements is determined by individual school criteria. The notation of TR indicates credit accepted from a postsecondary institution or awarded by AP/IB exam.

EXPLANATION OF COURSE NUMBERING SYSTEM

All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School

Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
		NVCC	Northern Virginia Community College
CU	Catholic University of America	PGCC	Prince George's Community College
GC	Gallaudet University	SEU	Southeastern University
GU	Georgetown University	TC	Trinity Washington University
GL	Georgetown Law Center	USU	Uniformed Services University of the Health Sciences
GMU	George Mason University		
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; *B,* Good; *C,* Satisfactory; *D,* Low Pass; *F,* Fail; *I,* Incomplete; *IPG,* In Progress; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *P,* Pass; *NP,* No Pass; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added*: A-, B+, B-, C+, C-, D+, D-.*
Effective Summer 1980: The grading symbols: *P,* Pass, and *NP,* No Pass, replace *CR,* Credit, and *NC,* No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) *A,* Excellent; *B,* Good; *C,* Minimum Pass; *F,* Failure; *I,* Incomplete; *IPG,* In Progress; *CR,* Credit; *W,* Authorized Withdrawal; *Z,* Unauthorized Withdrawal; *AU,* Audit. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; *B+, B, B-,* Good; *C+, C, C-,* Passing; *D,* Minimum Pass; *F,* Failure; *CR,* Credit; *NC,* No Credit; *I,* Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I,* the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System

H, Honors; *HP,* High Pass; *P,* Pass; *F,* Failure; *IP,* In Progress; *I,* Incomplete; *CN,* Conditional; *W,* Withdrawal; *X,* Exempt, *CN/P,* Conditional converted to Pass; *CN/F,* Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit http://www.gwu.edu/transcriptkey

This Academic Transcript from The George Washington University located in Washington, DC is being provided to you by Parchment, Inc. Under provisions of, and subject to, the Family Educational Rights and Privacy Act of 1974, Parchment, Inc. is acting on behalf of The George Washington University in facilitating the delivery of academic transcripts from The George Washington University to other colleges, universities and third parties.

This secure transcript has been delivered electronically by Parchment, Inc. in a Portable Document Format (PDF) file. Please be aware that this layout may be slightly different in look than The George Washington University's printed/mailed copy, however it will contain the identical academic information. Depending on the school and your capabilities, we also can deliver this file as an XML document or an EDI document. Any questions regarding the validity of the information you are receiving should be directed to: Office of the Registrar, The George Washington University, Tel: (202) 994-4900.

June 01, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in support of the clerkship application of Kira Pyne, a top-notch rising 3L student at George Washington University Law School.

I am a visiting associate professor at GWU, where I have taught and supervised students since Summer 2021. I previously practiced law at Feldesman Tucker Leifer Fidell LLP and Jenner & Block LLP, both here in Washington, D.C. I clerked on the U.S. Court of Appeals for the First Circuit and graduated from Yale Law School in 2014.

I have taught and supervised Kira in the GW Family Justice Litigation Clinic since January 2023. I supervised her and her partner in their representation of two clients, mothers facing severe domestic violence and contentious custody litigation. I saw Kira at minimum twice a week for extensive one-on-two supervision, met with her approximately once a week in a ten-student seminar, and communicated with her roughly three to four times a week by email/phone. I had the opportunity to supervise Kira in two contested trials and multiple other status hearings.

From my extensive experience working with her, I can say with confidence that Kira is a superb lawyer who would make an excellent judicial clerk. She has a gifted legal mind, complemented by a strong work ethic. Her impressive academic record speaks for itself, but it only presents part of the picture. Kira brings passion and commitment to her work; she cares about the right things, for the right reasons. The thing that impresses me most about Kira is her willingness to step up and take complete ownership of her casework, something that few law students, particularly 2Ls, are willing to do.

Kira is a strong, careful writer and researcher. In your chambers, Kira will deliver polished products and commit herself completely to your important work. You will be able to rely and count on Kira. You will find her to be a diligent professional, empathetic, kind to all those with whom she interacts, and a trusted interlocutor on the issues before the Court. Kira has my highest recommendation.

Please do not hesitate to contact me if I can offer additional observations. I would be delighted to speak in more detail about my experience supervising Kira.

Best,

Daniel Bousquet
Friedman Fellow and Visiting Associate Professor of Clinical Law for the Family Justice Litigation Clinic
The George Washington University Law School
dbousquet@law.gwu.edu